Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-969

J. P. HOUSE, ET AL.,

Petitioners,

VERSUS

GEORGE WALLACE, SR., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 74-2654

J.P. HOUSE, ET AL.,
Petitioners,

VERSUS

GEORGE WALLACE, SR., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

J.P. House, Et Al., your appellants pray that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals, Fifth Circuit, which affirmed a decision of the United States District Court, Western District for the State of Louisiana, Shreveport Division, which declared a mixed apportionment plan unconstitutional and ordered a single-member district apportionment plan for the Town of Ferriday, Louisiana.

OPINIONS BELOW

UNITED STATES DISTRICT COURT, WESTERN DISTRICT FOR THE STATE OF LOUISIANA, SHREVEPORT DIVISION

The trial judge wrote a lengthy opinion finding the at-large scheme of electing alderman in the Town of Ferriday unconstitutional; found the mixed apportionment plan presented by the Mayor and Board of Aldermen unconstitutional; and ordering a single-member district plan of apportionment. *Wallace v. House*, 377 F. Supp. 1192 (1974). The decision of the trial court is part of the record and made a part hereof in the Appendix, pp. 16a.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Appellants appealed the decision of the District Court and this court reversed the order of the lower court finding the mixed apportionment plan constitutional and ordered such a plan for the Town of Ferriday, Louisiana. *Wallace v. House*, 515 F. 2d 619 (1975). The decision of the Court of Appeals is attached hereto and made a part hereof in the Appendix, pp. 33a.

UNITED STATES SUPREME COURT

This Honorable Court vacated and remanded to the Fifth Circuit Court of Appeals for reconsideration in sight of *East Carroll Parish School Board v. Marshall*, 96 S. Ct. 1083. *Wallace v. House*, 96 S. Ct. 1721 (1976). The decision of the Supreme Court is attached hereto and made a part hereof in the Appendix pp. 56a.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

On remand from the Supreme Court of the United States, this Honorable Court reversed its prior decision and upheld the decision of the District Court ordering a single-member district apportionment plan for Ferriday, Louisiana, on the 17th day of September, 1976. *Wallace v. House*, No. 74-2654. The decision of the Court of Appeals is attached hereto and made a part hereof in the Appendix, pp. 57a.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Appellants' motion for rehearing denied on the 15th day of October, 1976. The denial is attached hereto and made a part hereof in the Appendix, pp. 69a.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mandate was issued on October 26, 1976, affirming the Judgment and Order of the District Court. The Mandate is attached hereto and made a part hereof in the Appendix, pp. 70a.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT STATE OF LOUISIANA, MONROE DIVISION

An Order was issued on November 1, 1976, ordering an election under the five (5) single member district plan, with said election procedures to start on December 1, 1976. The Order is attached hereto and made a part hereof in the Appendix, pp. 71a

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

A Motion for a Recall and Stay of the Mandate of this Court was filed on November 8, 1976, by counsel for appellants. Said Motion is attached hereto and made a part hereof in the Appendix, pp. 73a.

JURISDICTION

The most recent judgment of the Court of Appeals for the Fifth Circuit was entered on September 17, 1976.

Rehearing was denied on October 15, 1976.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Is the fact that, in the Town of Ferriday, there exists a voter ratio, that is approximately fifty (50%) percent black and fifty (50%) percent white, rare or special circumstances requiring the adoption of the mixed plan of apportionment. (Four single member districts and one at-large district).

STATUTORY PROVISIONS INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C., Section 1973 (c), provides in pertinent part:

> "Whenever a State or political subdivision with respect to which the prohibition set forth in section 4(a) based upon

> determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to a vote on account of race or color or in contravention of the guarantees set forth in section 4(f) (2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualifications, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection with sixty days after such submission, except that neither . . . the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure."

STATEMENT OF THE CASE

Ferriday, Louisiana, is a Mississippi River delta town with a population of approximately 5,200 people, according to the 1970 census. The black population consists of 3,000 people or 58% of the population, with the white population containing 42% or 2200 people. On the other hand the white people of

Ferriday, Louisiana enjoy a very small edge in the voting strength of the Town. The white population has 1,571 voters or 50.5% and the black voters, numbering 1,538 or about 49.5% of the registered voters. The youth and transit nature of the black community accounts for the difference between their population and registered voters.

Following the 1972 general election in which no blacks were elected to the Mayor and Board of Aldermen, a civil action was filed in the United States District Court, Western District, State of Louisiana, Shreveport, Louisiana, under the Voting Rights Act, 42 U.S.C., Section 1973(c). The District Court found the all at-large voting scheme employed by the Town of Ferriday, unconstitutional and ordered a five single member district plan on June 6, 1974. The Court of Appeals sustained the District Court's findings that the all at-large plan was unconstitutional; however, it reversed the lower court and ordered a mixed plan which entailed four single member districts and one at large member.

The Supreme Court vacated and remanded to the Fifth Circuit Court of Appeals for reconsideration in light of the *East Carroll Parish School Board v. Marshall* case.

After reconsideration, the Court of Appeals held that no special circumstances were ascertained by the District Court which would require ordering the mixed plan of apportionment and therefore, affirmed the lower court's decision and ordered the five single member district plan for the Town of Ferriday.

REASONS FOR GRANTING THE WRIT

In *Wallace v. House*, 96 S. Ct. 1721, this Court commanded a review of this case in the light of *East Carroll Parish School Board v. Marshall*, 96 S. Ct. 1083. The United States Court of Appeals, Fifth Circuit, had reversed the lower court's decision which ordered remedical relief in the form of five single member districts as the apportionment scheme for the Town of Ferriday, and ordered a mixed district plan.

As the Fifth Circuit review the instant case in the light of *East Carroll*, it created an almost unsummountable task for those who wish to contest the judgment of a lower court with respect to the lower court's ruling pertaining to single-member districts as opposed to the mixed districting plan. In fashioning its decision, the Fifth Circuit Court of Appeals found where the lower court ordered single-member districts, the question on appeal then became whether the presumptively proper choice of the District Court must be overturned as an abuse of discretion. *Wallace v. House*, _____ F. 2d _____. More particularly, the question presented in their decision, does the special circumstances compel the District Court to reject the single member plan and thereby order an at-large district. It is respectively suggested that there exists such special and unusual circumstances in the Town of Ferriday which should compel the lower court to order the mixed apportionment plan with the single at-large district as a feature of that plan.

The tribunal stated that because of the dictum in *East Carroll*, certain circumstances would "dictate the use of multi-member districts." 96 S. Ct. at 1085. Following that statement the Court provided four (4) arguments which, in their opinion, proved that a remand to the District Court would not be necessary.

First, the Fifth Circuit refused to remand because no remand was issued in the *East Carroll* case; therefore, no remand should issue herein. A different set of circumstances prevailed in East Carroll Parish. The special circumstance in existence in Ferriday, Louisiana, is the almost equal proportion of black

and white voters. In East Carroll Parish, there was as much greater divergence of the black-white voter ratio. It is contended that the equal number of black and white voters is a special circumstance that should have been considered by the District Court, if those circumstances would have been considered, the District Court, quite possibly, would not have found any constitutional infermity with the mixed apportionment plan and may have ordered that plan.

It should be mentioned at this point that there was no finding of fact concerning the 50.5% - 49.5% white to black voter ratio made by the District Court. The lower court never considered these circumstances in the light of the *East Carroll* ruling which stated:

> "When the United States District Courts are put to the task of fashioning re-apportionment plans to support concededly invalid state legislation, single-member districts are to be preferred *absent unusual circumstances.*" 96 S. Ct. at 1085. (emphasis added.)

Appellants accept the challenge of the very heavy burden placed on them by the Supreme Court and the Fifth Circuit, and suggests that the special circumstances existing in Ferriday are sufficient to meet the burden.

Further, the Fifth Circuit stated under their first argument, that if the Supreme Court wanted a remand to this District Court, a remand would have been explicitly ordered. While it is conceded that no remand was ordered, it should be noted that neither was a reversal ordered. This Honorable Court simply ordered a reconsideration under the rule of *East Carroll* to consider whether special circumstances existed. Since the lower court made no reference to special circumstances of the 50-50 voter registration, it is respectfully submitted that a remand should have been granted in order to accept evidence

and reconsider the mixed apportionment plan under those special circumstances.

The second reason no remand was granted by the Appellate Court was the District Court could have found the special circumstances and denominated them as such. If a finding of fact would have made mention of the voter ratio and the Court then not made a finding of special circumstances sufficient to warrant the mixed plan, appellants would concede this issue. But such findings of fact was not made, leading the appellants to believe that the issue of the voter ratio was not considered by the District Court under the "special circumstances" rule of *East Carroll.*

Further, the Appellate Court suggests that enough time has elapsed since this litigation was begun, therefore, the case should be settled and an election be had. First of all, ultimate fairness should not be surrendered in the name of expediency. Secondly, an election has been held under the mixed plan approved by the Court of Appeals for the Fifth Circuit. It should be noted that in that election, the black population chose not to even run a candidate for either mayor or for the at-large alderman position, much to the surprise of virtually every voter in the community. A white candidate for mayor, supported almost entirely by the black population, was elected and the encumbant mayor of tweny eight years was unseated. There are those that speculate that if a black would have run for the at-large seat, he would have also been elected.

The third reason for no remand is a finding by the appellate court that there were no special circumstances. The findings of fact are a task reserved to the District Court, and such a finding by an appellate court is a usurpation of power granted to the lower court. Plainly, appellants contend there are special circumstances in the Town of Ferriday. *Under the jurisprudence, at-large districts are permitted by the District Court*

where there would be grave defects under a single-member system. Grave defects abound under the single-member plan for the Town of Ferriday. White voters will lose a substantial amount of their voting strength. There is a need to look at the circumstances that exist in the small community of the Town of Ferriday, more particularily the almost equal voting population. In Ferriday, there exists, for all intent and purposes, no actual majority or minority. The black and white voting population are separated by one (1%) percentage point with the white voters maintaining the slim advantage. (As per the 1970 census, the white voters were numbered at 1,571 of 50.5% and the black voters were numbered at 1,538 or 49.5%). Such circumstances should be considered at least "rare" if not "special". Consider further, that due to the geographical layout of the town there is no conceivable way to apportion, without significant gerrymandering, to allow two "safe" black districts and two "safe" white districts and a fifth district would reflect a 50-50 break down of black and white voters. Therefore, the only wat to alleviate this situation is with the mixed apportionment plan. Such a plan would allow each race to elect two aldermen responsive to their needs and ideals and to the district from which they were elected, and allow the entire town (slightly over 3,000 voters) to elect an at-large councilman, responsive to the ideals and needs of the entire town.

The white population of Ferriday does not endeavor to depress the rights and desires of the black population, quite to the contrary. White citizens of Ferriday have grown to accept the commands of the United States Supreme Court and now live in relative harmony with the black citizens of the community. But the white population does, however, endeavor to have an equal opportunity to participate in the political process. To visit five single-member districts upon the Town of Ferriday will significantly reduce white participation in the government of the town. On the other hand, an at-large member, where the voting population is evenly divided, will give

both sides an equal opportunity to elect a member of their own race and not appreciably stack the cards against the white or black population.

It is conceded that the original completely at-large scheme discriminates against the black voters and diluted their voting strength but such is not the case with the mixed districting plan now in effect. A five single-member district plan opens the door for unscrupulous blacks to assume control of local politics and punish whites for their mistreatment of blacks in the past, a reverse discrimination and deprivation of equal protection and due process of law guaranteed by the Fourteenth Amendment, if you would. Such a plan would allow the white population no redress through their voting strength for it would regrettably be diminished.

It is not the intent of the writer to paint a corrupt picture of the black leaders in the Town of Ferriday, but simply to show the extreme ends to which the ruling of this court could be carried without there being any or at least little voter redress by the white voters in the Town of Ferriday.

A drawback to the multi-member districts, at large or mixed districting plan, is that minorities are submerged. There is affectively no minority in the Town of Ferriday. With that in mind, it strains the imagination to envision a single at-large alderman's seat submerging either races voting strength for the race with the superior voting strength should elect their alderman to represent them. It certainly takes no imagination to see how the other single-member districting plan submerges the white vote.

The appellate court contends that the mixed plan will result in three whites and two blacks on the town council. Such is not necessarily the case. Assuming blacks vote for blacks and whites vote for whites, the majority race should succeed. If

black voters are the majority, they would elect three blacks on the Board of Aldermen. On the other hand, if whites are in the voting majority and Ferriday is ordered to remain under the single member scheme, it is highly improbable, due to the geographical layout of Ferriday and the proposed districting plan, that three whites would ever be elected.

It is suggested, therefore, that in Ferriday, special compelling circumstances exist to justify the adoption of the mixed apportionment plan. Under the plan now in effect, both the black and white delegations can each elect two aldermen. The election of the at-large aldermen will determine which race will have the majority representation on the Board. That alderman will, on many occasions, cast the deciding vote on key issues. He will have to be responsive to the needs of the entire town rather than just one section of the community. Such a system would result in a more representative type of government.

The race with the greatest number of voters will be able to elect a representative from his race. The other race, the minority, will be able to slate candidates, affectively campaign, form and join political organizations, and, should our assumption that blacks vote for blacks and whites vote for whites be fallacious, quite possibly elect their own candidate.

Certainly, the above described circumstances (a black-white fifty-fifty voter ratio) are not usual and diurnal, but are, in fact, rare and exceptional. Very rarely is there found a situation where only 43 votes or one (1%) percent of the votes separate two political factions or races. Further, there exists no conceivable method of apportioning into five single member districts which would create two "safe" white districts and a fifth district which would reflect the voter make-up of the town. It is therefore, suggested and this Court is implored to consider these circumstances to be "special" and that they are a "singular combination of unique factors" which may permit

the District Court to conclude that the single member plan is outweighed by the grave defects of the plan as applied to this particular case. It is also suggested that the one at-large district would better serve the values of fair representations and political access as well as providing a more responsive government for the Town of Ferriday.

The Fifth Circuit Court of Appeals states that appellants do not allege that a single-member plan would threaten the constitutional rights of some voters as was done in the *Mahan* decision. The Appellants allege the same voter discrimination under the single-member plan as do the plaintiffs under the mixed district plan. Under the single-member plan the white vote will be diluted and their access to the political process diminished to a greater extent than the dilution of the black vote and dimunition of black political access under the mixed plan. In fact, it is contended that the black vote will not be diluted under the mixed plan nor will the black voters suffer any dimunition to the political process relative to that of the white voter.

The reason often given for ruling a multi-member scheme unconstitutional is the dilution of the minority vote. The test for dilution given in the *Zimmer v. McKeithen*, 485 S. 2d 1297 (1973), is two-fold. The first part of the test is one man's vote should as nearly as possible equal another man's vote in an apportionment plan. 485 at 1303. Plaintiffs have argued that the single at-large seat dilutes the black vote 2099 in the Town of Ferriday. Of course, this point is contested and it is appellants contention that there is no dilution of the black vote under the present mixed plan. The blacks can elect at least two aldermen for the black district and have as good a chance, man for man, vote for vote, as the whites having in electing a third alderman of their race as the at-large councilman. The five single-member districts proposed by plaintiffs, on the other hand, would appreciably decrease the one-man, one-vote ratio of the white voters. The blacks would have three "safe"

districts and the white only two "safe" districts. The black vote would be, in effect, fifty (50%) percent greater than the white vote in a community that admits an approximate 50-50 vote ratio because it will be able to elect fifty (50%) percent more aldermen than white voters. Such is a submergence of as well as a fifty (50%) percent dilution of the white vote.

The second part of the *Zimmer* test is ". . . the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population." 485 F. 2d at 1303. The present mixed plan does not "minimize or cancel out the voting strength" of the black population. On the contrary, it allows the entire community to determine the fifth member of the Board of Alderman. But the plaintiffs' scheme of apportionment will decrease and minimize the white vote in such a manner as to substantially decrease the white voting strength. It would, in fact, be dilution of the white vote.

It is noted that plaintiffs contend that in the past the white city officials have been unresponsive to the needs of the black community. This contention is totally false and not supported by the evidence introduced in the District Court. The black community has paved streets, lighting, drainage, sewerage, garbage collection, police protection, municipal employment, and other municipal benefits that are equal to that of the white community. Under the present plan, blacks and whites share equally in the political process.

The fourth reason given for no remand is that since the District Court found the mixed plan constitutionally infirm, it obviously found no special circumstances. This is a case of the appellate court substituting its reasoning for that of the lower court. The lower court did not consider the voter ratio of the Town of Ferriday. It is contended by appellant that if the court could have made a finding of fact relative to the fifty-fifty voter ratio, the mixed plan would not have been found to dilute

the black vote, and therefore, not constitutionally unacceptable. It is further contended that based on the equality of number of voters in Ferriday, the lower court should have chosen the mixed plan as the most acceptable plan.

The Fifth Circuit in determining whether the District Court abused its discretion in ordering a single member district plan appears to resort to subjective reasoning in reaching a finding of "no abuse" of discretion, i.e., since the District Court found the mixed plan to be constitutionally infirm, therefore, there must not be any compelling circumstances which would show that the mixed plan was better to serve the needs of all the people of Ferriday. Certainly, the appellate court in so doing is going far beyond the record. They once decided that the District Court was wrong in its findings that the mixed plan was unconstitutionally infirm. The District Court could be wrong in other areas as well, especially where it made no mention of the voter ratio.

It is contended by defendants-appellants that when the District Court decided this case, it was not fully appraised of and did not fully consider the "special" circumstances that existed in the Town of Ferriday in the light of the decision in *East Carroll.* The District Court made no finding of fact relative to the fifty-fifty black-white voter ratio. The plan ordered by the District Court was based on population with no, or at least, very little consideration, given to the voter ratio. It should be noted that the emphasis of this argument has been placed on the "voter" population, rather than on population. This is in accord with the recent decision of the Supreme Court. In *Gaffney v. Cummings,* 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298, it was stated that "it is the weight of a person's vote that matters, total population, even if stable and accurately taken, may not actually reflect that body of voters whose votes must be counted and weighted for purposes of reapportionment because "census persons are not voters." Further, to the

political process and not population has been considerated the barometer of dilution of minority voting strength. *Whitcomb Chavis*, (1971) 403, U.S. 124, 91 S. Ct. 1898, 29 L. Ed 2d 363 and *White Register* (1973) 412 U.S. 755, 935 Ct. 2332, 37 L. Ed. 2d 314. Considering the foregoing statements of law, the fact that the black population is greater than the white population should not change the fact that there exists a near equal voter ratio.

The District Court based its conclusion strictly on its finding that the mixed plan was constitutionally infirm which finding has been reversed by this Court. Blacks are a minority in most locales and at-large schemes do dilute their voting strength, but in the Town of Ferriday no clear voter minority or majority exists. It is suggested that if the District Court considered the instant case in the light of *East Carroll* concerning the special circumstances, said special circumstances would have influenced the District Court's decision.

CONCLUSION

For the foregoing reasons, appellants urge that this Honorable Court remand to the District Court in order that there may be an exploration and finding made as to "special circumstances." For it is submitted that the mixed districting plan will better serve the Town of Ferriday and that once the District Court is appraised of the Special Circumstance, it will concur in that Suggestion.

Respectfully Submitted,

Norman Magee per m.a.s

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit was served upon plaintiffs-appellees, by mailing a copy to plaintiffs-appellees' attorneys of record, Mr. Jack Greenberg, Mr. Eric Schanpper, Mr. Paul Henry Kidd, Mr. Stephen J. Katz and Mr. Stanley A. Halpin, Jr., by first class postage prepaid, this day by mailing same to Mr. Stanly A. Halpin, Jr., 344 Camp Street, New Orleans, Louisiana, 70130.

Ferriday, Louisiana, this 16th day of November, 1976.

Norman Mager per m.a.s.
NORMAN MAGER

APPENDIX

EAST CARROLL PARISH SCHOOL BOARD AND EAST CARROLL PARISH POLICE JURY, Petitioners,

v

STEWART MARSHALL

– US –, 47 L Ed 2d 296, 96 S Ct –

[No. 73-861]

March 8, 1976.

SUMMARY

In reapportionment proceedings instituted by a resident of East Carroll Parish, Louisiana, the United States District Court for the Western District of Louisiana adopted a multimember plan calling for at-large election of members of the parish (county) police jury (governing body of the parish) and the parish school board. A panel of the United States Court of Appeals for the Fifth Circuit originally affirmed (467 F2d 1381), but on rehearing en banc, the Court of Appeals reversed (485 F2d 1297).

On certiorari, the United States Supreme Court affirmed. In a per curiam opinion, it was held (1) expressing the unanimous view of the court, that the District Court had abused its discretion in not ordering a single-member reapportionment plan, since no special circumstances dictated the use of multimember districts, and (2) expressing the view of eight members of the

court, that the preclearance procedures of § 5 of the Voting Rights Act of 1965 (42 USCS § 1973c) were not applicable when a District Court adopted a reapportionment plan submitted to it by a local legislative body that was covered by the Act.

BURGER, Ch. J., concurring, expressed the view that it was unnecessary to consider the applicability of § 5 of the Voting Rights Act, since the parties had not raised the question.

EAST CARROLL PARISH SCHOOL v MARSHALL
47 L Ed 2d 296

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Counties § 24; Schools § 1 – reapportionment – Federal District Court order

1. In adopting a multimember reapportionment plan calling for the at-large election of members of both a parish (county) police jury (governing body of the parish) and the parish school board, a Federal District Court abuses its discretion in not ordering a single-member plan, where no special circumstances dictate the use of multimember districts.

Civil Rights § 5.1 – Voting Rights Act – judicial reapportionment plan

2a, 2b. The preclearance procedures of § 5 of the Voting Rights Act of 1965 (42 USCS § 1973c) need not be complied with prior to adoption by a Federal District Court of a reapportionment plan submitted to it on behalf of a local legislative body that is covered by the Act; court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5 even though clearance under § 5 would be required if the local legislative body had reapportioned itself on its own authority.

Legislature § 6 – reapportionment – federal court order

3. When Federal District Courts fashion reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred, absent unusual circumstances.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

15 Am Jur 2d, Civil Rights § 17.4; 25 Am Jur 2d, Elections §§ 12, 31, 34; 68 Am Jur 2d, Schools § 11

9 Am Jur Pl & Pr FORMS (Rev ed), Elections, Forms 7, 8, 10

42 USCS § 1973c

US L Ed DIGEST, Counties § 24; Schools § 1

ALR DIGESTS, Counties § 1; Schools § 1

L Ed INDEX TO ANNOS, Elections; Schools

ALR QUICK INDEX, Counties; Discrimination; Elections; Schools

FEDERAL QUICK INDEX, Civil Rights; Counties; Elections; Schools and School Districts

ANNOTATION REFERENCES

Racial discrimination in voting, and validity and construction of remedial legislation. 27 L Ed 2d 885.

To what governmental agencies, units, offices, or subdivisions of a state, other than the state legislature, is the "one man-one vote" rule applicable. 18 L Ed 2d 1537.

Inequalities in population of election districts or voting units as rendering apportionment unconstitutional. 12 L Ed 2d 1282.

OPINION OF THE COURT

Per Curiam.

The sole issue raised by this case is how compliance with the one-man, one-vote principle should be achieved in a parish (county) that is admittedly malapportioned.

Plaintiff Zimmer, a white resident of East Carroll Parish, brought suit in 1968 alleging that population disparities among the wards of the parish had unconstitutionally denied him the right to cast an effective vote in elections for members of the police jury [1] and the school board. See Avery v. Midland County, 390 US 474, 20 L Ed 2d 45, 88 S Ct 1114 (1968). After a hearing the District Court agreed that the wards were unevenly apportioned and adopted a reapportionment plan suggested by the East Carroll police jury calling for the at-large election of members of both the police jury and the school board. [2] The 1969 and 1970 elections were held under this plan.

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[1] In Louisiana, the police jury is the governing body of the parish. Its authority includes construction and repair of roads, levying taxes to defray parish expenses, providing for the public health, and performing other duties related to public health and welfare. La Rev Stat § 33:1236 (1950).

[2] Prior to 1968, Louisiana law prohibited at-large elections of members of police juries and school boards. In July 1968, the Governor of Louisiana approved enabling legislation permitting the at-large election of parish police juries and school boards. La Acts 1968, No. 445, codified at La Rev Stat §§ 33:1221, 22:1224 (1974); La Acts 1968, No. 561, codified at La Rev. Stat §§ 17:71.6 (1974).

The proceedings were renewed in 1971 after the District Court, apparently sua sponte, instructed the East Carroll police jury and school board to file reapportionment plans revised in accordance with the 1970 census. In response, the jury and board resubmitted the at-large plan. Respondent Marshall was permitted to intervene on behalf of himself and all other black voters in East Carroll. Following a hearing the District Court again approved the multimember arrangement. The intervenor appealed, [3] contending that at-large elections would tend to dilute the black vote in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965.

Over a dissent, a panel of the Court of Appeals affirmed, [4] but on rehearing en banc, the court reversed. [5] It found clearly erroneous the District Court's ruling that at-large elections

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[2] (Continued) Both Acts were submitted to the United States Attorney General pursuant to § 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c [42 USCS § 1973c], and both were rejected because of their discriminatory effect on Negro voters. See letters, June 26, 1969, and September 10, 1969, from Jerris Leonard, Assistant Attorney General, Civil Rights Division, to Jack P.F. Gremillion, Attorney General of Louisiana. Indeed, East Carrol Parish was cited as exemplifying the dilution in black ballot strength that at-large voting may cause. Id., September 10. 1969.

[3] The original plaintiff, Zimmer, was allowed to withdraw from the case.

[4] Zimmer v. McKeithen, 467 F 2d 1381 (CA5 1972).

During pendency of the appeal in the court below, the District Court purported to withdraw its order approving the at-large plan and to substitute in its stead a complex redistricting plan submitted by intervenor Marshall. The Court of Appeals vacated the order on the ground that when the appeal was filed, the District Court lost jurisdiction over the case. Id., at 1382.

[5] Zimmer v. McKeithen, 485 F2d 1297 (CA5 1973) (en banc).

would not diminish the black voting strength of East Carroll Parish. Relying upon White v Regester, 412 US 755, 37 L Ed 2d 314, 93 S Ct 2332 (1973), it seemingly held that multimember districts were unconstitutional, unless their use would afford a minority greater opportunity for political participation, or unless the use of single-member districts would infringe protected rights.

[1, 2a] We granted East Carroll School Board's petition for a writ of certiorari, 422 US 1055, 45 L Ed 2d 707, 95 S Ct 2677 (1975), and now affirm the judgment below, but without approval of the constitutional views expressed by the Court of Appeals. 6/ See Ashwander v. TVA, 297 US 288, 346-347, 80 L Ed 688, 56 S Ct 466 (1936) (Brandeis, J., concurring).

[3] The District Court, in adopting the multimember, at large reapportionment plan, was silent as to the relative merits of a single-member arrangement. And the Court of Appeals, inexplicably in our view, declined to consider whether the District Court erred under Connor v Johnson, 402 US 690, 29 L Ed 2d 268, 91 S Ct 1760 (1971), in endorsing a multimember plan, resting its decision instead upon constitutional grounds. We have frequently reaffirmed the rule that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances. Chapman v Meier, 420 US 1, 17-19, 42 L Ed 2d 766, 95 S Ct 751 (1975); Mahan v Howell, 410 US 315, 333, 35 L Ed 2d 320, 93 S Ct 979 (1973); Connor v Williams, 404 US 549, 551, 30 L Ed 2d 704, 92 S Ct 656 (1972); Connor v Johnson, supra, at 692, 29 L Ed 2d 268, 91 S Ct 1760. As the en banc opinion of the Court of Appeals amply demonstrates, no special circumstances here dictate the use of multi-member districts. Thus, we hold that in shaping remedial relief the District Court abused its discretion in not initially ordering a single-member reapportionment plan.

On this basis, the judgment is affirmed.

[300] SEPARATE OPINION

Mr. Chief Justice Burger concurring.

I consider it unnecessary to reach the question discussed in n 6, p 3. It was, as the Court observes in n 6, "not raised by the petitioner, nor did respondent file a cross-petition." The scope of § 5 of the Voting Rights Act is an important matter and I would not undertake to express any view on what the Court discusses by way of dicta in n 6.

6/ [2b] The Government has filed a brief amicus, in which it argues that the preclearance procedures of § 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c [42 USCS § 1973c], must be complied with prior to adoption by a federal district court of a reapportionment plan submitted to it on behalf of a local legislative body that is covered by the Act. This issue was not raised by the petitioner, nor did respondent file a cross-petition. In any event, we agree with the Court of Appeals, Zimmer v. McKeithen, 467 F2d 1381, 1383 (CA5 1972); Zimmer v. McKeithen, 485 F2d 1297, 1302 n 9 (CA5 1973) (en banc), that court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5. Had the East Carroll police jury reapportioned itself on its own authority, clearance under § 5 of the Voting Rights Act would clearly have been required. Connor v. Waller, 421 US 656, 44 L Ed 2d 486, 95 S Ct 2003 (1975). However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation, see n 2, supra, and statutes cited therein, which permitted police juries and school boards to adopt at-large elections. App, at 56. Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under § 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself. See n 2, supra; Tr of Oral Arg 13-14, 31-32, 43-44. Since the reapportionment scheme was submitted and adopted pursuant to the court order, the preclearance procedures of § 5 do not apply. Connor v. Johnson, 402 US 690 691, 29 L Ed 2d 268, 91 S Ct 1760 (1971).

* * *

No. 71-1476

J. Brian Gaffney, Appellant.

v.

Theodore R. Cummings et al.

On Appeal from the United States District Court for the District of Connecticut.

June 18, 1973

Syllabus

Connecticut's legislative apportionment plan was held by the District Court to be unconstitutional because partisan political structuring had resulted in excessive population deviations in the House districting. Held;

1. Minor deviations from mathematical equality among state legislative districts do not make out a prima facie case of invidious discrimination under the Equal Protection Clause of the Fourteenth Amendment, and in this case, where the House districts deviated on the average by 1.9% and the maximum deviation was 7.83%, a prima facie case was not made out.

2. A "political fairness principle" that achieves a rough approximation of the statewide political strengths of the two major parties does not violate the Equal Protection Clause. 341 F. Supp. 139, reversed

WHITE. J., delivered the opinion of the Court, in which Burger, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

MR. JUSTICE WHITE delivered the opinion of the Court.

The questions in this case are whether the population variations among the election districts provided by a reapportionment plan for the Connecticut General Assembly, proposed in 1971, made out a prima facie case of invidious discrimination under the Equal Protection Clause and whether an otherwise acceptable reapportionment plan is constitutionally [illegible] purpose is to provide districts that would achieve "political fairness" between the political parties.

I

The reapportionment plan for the Connecticut General Assembly became law when published by the Secretary of the State in December 1971. Under the Connecticut Constitution, the state legislature is given the initial opportunity to reapportion itself in the months immediately following the completion of decennial census of the United States. Conn. Const., Art. III, § 6 (b). In the present case, the legislature was unable to agree on a plan by the state constitutional deadline of April 1, 1971. The task was therefore transferred, as required by the constitution, to an eight-member bipartisan commission. *Ibid.* The Democratic and Republican Party leaders in the legislature each appointed four commissioners. The commission was given until July 1, 1971, to devise a reapportionment plan, *id.*, § 6 (c); but, although the commission approached agreement, it too was unable to adopt a plan within the deadline. Accordingly, as a final step in the constitutional process, a three-man bipartisan Board was constituted. *Id.*, § 6 (d). The Speaker of the House of Representatives, a Democrat, and the Republican Minority Leader of the House each chose a judge of the State Superior Court to be a Board member, and the two judges in turn designated a third Board member, who was a justice of the State Supreme Court. *Id.*, § 6 (d)

This Apportionment Board, using the census data available during the summer of 1971, and relying heavily on the legislative commission's tentative plans, filed a reapportionment plan on September 30, 1971, with one member dissenting.

According to the 1970 census data before the Board, the population of Connecticut is 3,032,217. The Board's reapportionment plan provides for a Senate consisting of 36 senators elected from single-member districts. The ideal senatorial district, in terms of population, would thus contain 84,228 people. The districts actually created deviate, on the average, by 0.45% from this ideal, the median deviation being 0.47%. The largest and smallest senatorial districts deviate by +0.88% and –0.93%, respectively, making the total maximum deviation 1.81%. 1/

The reapportionment plan proposed a House of 151 single-member districts. The population of the ideal assembly district would be 20,081. The average deviation from perfect equality for all the plan's assembly districts is 1.9%, the median deviation, 1.8%. The maximum deviation from the ideal is +3.93% and –3.9%. The maximum deviation between any two districts thus totals 7.83%. 2/

In Connecticut, towns rather than counties are the basic unit of local government. *See Butterworth v. Dempsey*, 229 F. Supp. 754, 761 (Conn.), aff'd. 378 U.S. 564 (1964). The state constitution provides that "no town shall be divided" for the purpose of creating House districts, except where districts are formed

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1/ The ratio of the largest Senate district to the smallest is 1.018 to 1.

2/ The ratio of the largest assembly district to the smallest is 1.082 to 1.

"wholly within the town." Art III, § 4. No comparable directive exists for the creation of Senate districts. The constitution further provides, however, that the "establishment of districts . . shall be consistent with federal constitutional standards." *Id.*, § 5. To meet those standards and to reach what it thought to be substantial population equality, the Board cut the boundary lines of 47 of the State's 169 towns. 3/ The Board also consciously and overtly adopted and followed a policy of "political fairness." which aimed at a rough scheme of proportional representation of the two major political parties. Senate and House districts were structuredso that the composition of both Houses would reflect "as clearly as possible . . . the actual [statewide] plurality of vote on the House or Senate lines in a given election." 4/ Rather than focus on party membership in the respective districts, the Board took into account the party voting results in the preceding three statewide elections, and, on that basis, created what was thought to be a proportionate number of Republican and Democratic legislative seats.

In November 1971, not long after the Board filed the reapportionment plan with the Secretary of the State, an action was brought in federal district court seeking declaratory and

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3/ Some town boundaries were cut more than once, resulting in what the parties have termed "town segments," or portions of a town that were used to form an assembly district not wholly within that town. The Board's plan creates 78 such segments in the formation of the 151 assembly districts.

4/ Testimony of Judge George A. Saden, the Republican Board member, App. 264. According to Mr. James F. Collins, a staff member of the Board, the plan for the House resulted in approximately 70 safe Democratic seats, 55 to 60 safe Republican seats, with the balance characterized as probable or swing Democratic or republican or "just plain swing," 341 F. Supp. 139, 147. See App. 126-127.

injunctive relief against implementation of the plan. The complaint alleged that the Board "erroneously applied the one man-one vote doctrine of the Fourteenth Amendment . . . to achieve smaller deviations from population equality for the assembly districts than was required by the Fourteenth Amendment . . . and thereby was compelled to segment an excessive number of towns in forming assembly districts." The complaint further alleged the plan amounted to a political gerrymander and contained "a built-in bias in favor of the Republican Party." Appellant Gaffney, the Chairman of the State Republican Party, was permitted to intervene in support of the Board's plan and, after a three-judge court was empaneled, the court heard testimony in March 1972. At the hearing, plaintiffs introduced three alternative House apportionment plans that required fewer town-line cuts, although all three plans involved total deviations from population equality in excess of those contained in the Board plan.[5] A fourth plan for the House was submitted with a total maximum deviation from population equality among districts of 2.61%, as compared with the Board plan, which contained a 7.83% total maximum deviation. This alternative plan, however, was prepared without regard for town lines, which were cut substantially more times than in the Board plan.[6] Considerable evidence was introduced demonstrating

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[5] The Board's Senate plan was not challenged in the District Court and no alternative Senate plan was introduced. Appellees do not challenge the Senate districts on the ground of their population deviations. Brief for Appellees 14 n. 4; Tr. of Oral Arg. 20.

[6] Plaintiffs' plan resulted in 58 town-line cuts and 88 town segments, as opposed to the corresponding figures of 47 and 78 in the Board's plan.

the obvious political considerations in the Board's district-making.[7] In late March, the District Court filed its decision invalidating the Board plan and permanently enjoining its use in future elections. 341 F. Supp. 139. The court held that "the deviations from equality of populations of the Senate and House districts are not justified by any sufficient state interest and that the plan denies equal protection of the law to voters in the districts of greater population. . . ." *Id.*, at 148. The court relied in part on *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). More particularly, the court found that the policy of "partisan political structuring" "cannot be approved as a legitimate reason for violating the requirement of numerical equality in districting." *Id.*, at 149. The court therefore required that a plan reflecting "closer adherence to the constitutional guidelines" be adopted. Jurisdiction over the case was retained for all purposes, and the court announced that it "will appoint a master . . . to devise a plan conforming to federal and state constitutional requirements. . . ." *Id.*, at 150.

On June 12, 1972, after a motion to expedite consideration of the appeal had been denied (406 U.S. 942), this Court granted appellant's motion for a stay of the District Court's judgment. 407 U.S. 902. On the basis of that stay, and a subsequent supportive state order,[8] the 1972 fall elections for the State Assembly were held under the Board's reapportionment plan. When this Court convened in October 1972, we noted

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[7] Plaintiffs further offered testimony illustrating the undesirability—in the context of the State's administrative apparatus— of excessive cutting of town lines.

[8] The order was entered in a parallel state proceeding. *Miller v. Schaffer, Sec. of the State*, No. 173606, Super. Ct., Hartford County, filed November 12, 1971, which was directed at correcting certain clerical errors or omissions in the Board's plan.

probable jurisdiction over the appeal. 409 U.S. 839. By this time, a master had been appointed by the District Court and had prepared a reapportionment plan.

II

We think that appellees' showing of numerical deviations from population equality among the Senate and House districts in this case failed to make out a prima facie violation of the Equal Protection Clause of the Fourteenth Amendment, whether those deviations are considered alone or in combination with the additional fact that another plan could be conceived with lower deviations among the State's legislative districts. Put another way, the allegations and proof of population deviations among the districts fail in size and quality to amount to an invidious discrimination under the Fourteenth Amendment which would entitle (illegible) absent some countervailing showing by the State.

The requirement of Art. I, § 2, of the Constitution, that representatives be chosen "by the people of the several States," mandates that "one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (footnote omitted). This standard "permits only the limited population variations which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). In *Kirkpatrick* and in *Wells v. Rockefeller*, 394 U.S. 542 (1969), the Court found inconsistent with this standard state statutes creating congressional districts having total maximum deviations of 5.97% and 13.1% respectively. It is the standard of these cases which is the prevailing rule under Art. I and which we confirm in *White v. Weiser, post. p. –*, today, for the purposes of congressional reapportionment.

Earlier this Term, the question arose whether the same

standard is applicable when reviewing state legislative reapportionments under the Equal Protection Clause of the Fourteenth Amendment. *Mahan v. Howell* , 410 U.S. 315 (1973). We concluded that there are fundamental differences between congressional districting under Art. I and the *Wesberry* line of cases on the one hand, and, on the other, state legislative reapportionments governed by the Fourteenth Amendment and *Reynolds v. Sims*, 377 U.S. 533 (1964). and its progeny. Noting that the "dichotomy between the two lines of cases has consistently been maintained," 410 U.S. at 322, we concluded that "the constitutionality of Virginia's legislative redistricting plan was not to be judged by the more stringent standards that *Kirkpatrick* and *Wells* make applicable to congressional reapportionment, but instead by the equal protection test enunciated in *Reynolds v. Sims*," (*id.*, at 324), that test being that districts in state reapportionments be as "as nearly of equal population as is practicable" and that "[s]o long as the divergencies from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy. Some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." *Reynolds, supra*, at 579. In *Mahan*, the ideal district was 46,485 persons per delegate. The maximum variation from the ideal was 16.4% "the 12th district being overrepresented by 6.8% and the 16th district being underrepresented by 9.6%" 410 U.S., at 319 (footnote omitted). The average percentage variation under the plan was +3.89%. Of the 52 house districts 35 were within 4% of the ideal district and nine exceeded a 6% variation from the ideal.

The asserted justification for the divergencies in *Mahan* was "the State's policy of maintaining the integrity of political subdivision lines," 410 U.S., at 315, a policy we found to be rational and wholly sufficient to justify the district

population disparities of the size and quality that had been found to exist. We ruled that the "relatively minor variations present in the Virginia plan contrast sharply with the larger variations in state legislative reapportionment plans which have been struck down by previous decisions of this Court," *Mahan, supra.* at 329, and that "Virginia has not sacrificed substantial equality to justifiable deviations." *ibid*

Although requiring that the population variations among legislative districts in *Mahan* be justified by substantial state considerations, we did not hold that in state legislative cases any deviations from perfect population equality in the districts, however small, make out prima facie equal protection violations and require that the contested reapportionments be stricken down absent adequate state justication. Nor had we so held in any prior state reapportionment case. *Swann v. Adams*, 385 U.S. 444 (1967), and *Kilgarlin v. Hill*, 386 U.S. 120 (1967), required state justification of population variations involved in each of these cases exceeded those we dealt with in *Mahan*.

In the case now before us appellant urges that the population variations among Senate and House districts in the Board plan did not in and of themselves demonstrate an equal protection violation and that the State was not required to justify them absent further proof of invidiousness by appellees. For several reasons we think the point is well taken and that the District Court erred in holding to the contrary.

As we noted in *Mahan v. Howell, Reynolds v. Sims* recognized that a State must make an honest and good faith effort to construct its districts "as nearly of equal population as is practicable," but that absolute equality was a "practical impossibility" ; "mathematical exactness or precision is hardly a workable constitutional requirement." 377 U.S. at 577, Moreover, the *Reynolds* court also noted that "some distinctions may well be made between congressional and state legislative representation," and that "[s]omewhat more flexibility

may therefore be constitutionally permissible with respect to state legislative apportionments than in congressional districting." *Id.*, at 578. All that would be required was "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*, at 579. In other words "simply stated an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted compared to the vote of citizens living in other parts of the state," *Id.*, at 568.

As these pronouncements have been worked out in our cases, it has become apparent that the larger variations from substantial equality are too great to be justified by an state interest so far suggested. There were thus the enormous variations stricken down in the early cases beginning with *Reynolds v. Sims.* 9/ as well as the much smaller, but nevertheless unacceptable deviations, appearing in later cases such as *Swann v. Adams*, 385 U.S. 440 (1967); *Kilgarlin v. Hill*, 386 U.S. 120

9/ *Reynolds v. Sims* involved the Alabama State Legislature, which had not reapportioned itself in over 60 years. Under the apportionment existing in 1964, some senatorial districts with the same number of representatives had over 40 times more people than other House districts with identical representation (illegible). In Maryland in 1964, some House districts with nominally equal representation could have six times more people than others, while senatorial districts could be 32 times larger than others. *Maryland Comm'n for Fair Representation v. Tawes*, 377 U.S. 656 (1964). The list may easily be expanded to include other States, and Connecticut is no exception. In 1964, the Connecticut towns of Hartford and Union had the same representation in the House, but Union had a population of 383 people, while Hartford had a population of 162,178. A vote in Union was thus weighted about 425 times heavier than a vote in Hartford. At that time it would have taken only 11.9% of Connecticut's population to elect a majority of its House and only 31% to elect a Senate majority. See *Butterworth v. Dempsey*, 299 F. Supp. 754 (Conn.), aff'd. 378 U.S. 564 (1964).

(1967); and *Whitcomb v. Chavis*, 403 U.S. 124. 161-163 (1971). On the other hand, as *Mahan v. Howell* demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justifiable and legally sustainable. It is now time to recognize, in the context of the eminently reasonable approach of *Reynolds v. Sims*, that minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.

We doubt that *Reynolds* would mandate any other result if for no other reason than that the basic statistical materials which legislatures and courts usually have to work with are the results of the United States census taken at 10-year intervals and published as soon as possible after the beginning of each decade. These figures may be as accurate as such immense undertakings can be, but they are inherently less than absolutely accurate. Those who know about such things recognize this fact, 10/ and, unless they are to be wholly ignored, it makes

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10/ See. *e.g.*, H. Alterman, Counting People. The Census in History 262 (1969):

"A census, by its nature, can never be an exact count of a nation. This is especially true of the United States. . . . Thus, an error of 1 or 2 percent in the count of the total population is to be expected; professionally, it is regarded as an 'acceptable' error."

The Census Bureau estimates that the 1970 census had an undercoverage rate of 2.5%, or about 5,300,000 people. Address of J.S. Siegel Population Association of American Annual Meeting, in New Orleans, La., April 26, 1973. See N.Y. Times, Apr. 26, 1973, p. 1, col. 1.

Inexactness of census data is most evident with respect to minorities. It is estimated, for example, that Negroes were underenumerated in the 1970 census by 7.7%, as compared to an estimated 1.9% undercount for white persons. *Ibid.* See also Siegel, "Completeness of Coverage of the Nonwhite Population in the 1960 Census and Current Estimates, and Some Implications," in Social Statistics and the City 13 (D. Heer, ed. 1968).

little sense to conclude from relatively minor "census population" variations among legislative districts that any person's vote is being substantially diluted. The "population" of a legislative district is just not that knowable to be used for such refined judgments.

What is more, it must be recognized that total population, even if absolutely accurate as to each district when taken, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan. The United States census is more of an event than a process. It measures population at only a single instant in time. District populations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena. 11/ So too, if it is the weight of a person's vote that matters, total population—even if stable and accurately taken—my not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because "census persons" are not voters. 12/ The proportion of the census

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11/ See, *e.g.*, M. Spiegelman, Introduction to Demography 415-416 (1968): U.S. Bureau of Census. The Materials and Methods of Demography 806 (1971).

In Connecticut, for example, the population of the State as a whole grew by 19.6% during the 1960's. But the population in the area comprising the Second Congressional District grew by over 28%, while the population in the Fourth District grew by only 11.2%. The U.S. Census Bureau, Congressional District Data Book, 93d Congress, Connecticut, p. 7 (1972).

12/ See *Burns v. Richardson*, 384 U.S. 73, 91-92 (1960)

"We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which the substantial population equivalency is to be measured . . . . Neither in *Reynolds v. Sims* nor in any other

population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States. The six congressional districts in Connecticut, for example, vary from one another by as much as 4% in their age-eligible voters, with the first district having 68% of its census population at voting age while the sixth district has 64% at 18 years or older. Bureau of the Census, Congressional District Data Book, 93d Congress, Connecticut, pp. 7-8 (1972). Other States have congressional districts that vary from one another by as much as 29% and as little as 1% with respect to their age-eligible voters. 13/ And these figures tell us nothing of the other ineligibles making up the substantially equal census populations among election districts: aliens, nonresident military personnel, nonresident students, for example. See *Burns v. Richardson*, 384 U.S. 73, 90-97 (1966). *Davis v. Mann*, 377 U.S. 678, 691-692 (1964); *Ely v. Klahr*, 403 U.S. 108, 115-116 n. 7 (1971); *Mahan v. Howell, supra*, 410 U.S., at 330-332. Nor do these figures tell anything at all about the proportion of all those otherwise eligible individuals whose vote cannot be

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12/ (Continued) decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., *e.g.*, *Carrington v. Rash*, 380 U.S. 89, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby."

13/ Utah, Rhode Island, New Hampshire and Missouri have only 1% variations. New York has a 29% variation in age-eligible voters among its congressional districts, while California has a 25% and Illinois a 20% variation. These figures may be computed from the Bureau of the Census' Congressional District Data, 93d Congress, for the respective States.

counted or weighed because they either failed to register or failed to vote. 14/

Reynolds v. Sims, of course, dealt with more than the statistical niceties involved in equalizing individual voting strength. It argued that "if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or ten times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted." 377 U.S., at 562. To conclude differently, "and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result." *Id.*, at 565. More fundamentally, *Reynolds* recognized that "the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment" (*id.*, at 565-566), and it was for that reason that the decision insisted on substantial equality of populations among districts.

This is a vital and worthy goal, but surely its attainment does not in any commonsense way depend upon eliminating the insignificant population variations involved in this case. Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical equality among

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14/ Again using Connecticut congressional districts as an example in the November 1972 elections, the percentage of registered voters who actually voted varied by a maximum of 2.8%. See Statement of Vote, General Election November 7, 1972, Pub Doc. No. 26, State of Conn. (1973), p. 72. The percentages of registered voters who voted varied by as much as 23% among the towns in the State. *Id.*, at 65-71.

district populations.[15] There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. See *Mahan v. Howell, supra; Abate v. Mundt*, 403 U.S. 182 (1971); *Dusch v. Davis*, 387 U.S. 112 (1967); *Sailors v. Board of Education*, 387 U.S. 105 (1967); *Burns v. Richardson, supra.* An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.

Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts who themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs, who may have wholly different goals than those embodied in the official plan. From the very outset, we recognized that the apportionment task, dealing as it must with fundamental "choices about the nature of representation." *Burns v. Richardson, supra*, 384 U.S. at 92, is primarily a political and legislative process. *Reynolds v. Sims, supra*, 377 U.S., at 586. We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature.

That the Court was not deterred by the hazards of the

15/ For discussions of the vast and growing literature in this area, see Reapportionment in the 1970s (N. Polsby ed. 1971).

political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.

This very case represents what should not happen in the federal courts. The official state functionaries proposed a plan with a maximum variation among the districts of 7.89% in the House and 1.8% in the Senate, and with respective average variations of 1.9% and .45%. Appellees then proposed four alternate plans for the House, three of which involved slightly larger variations among districts but cut fewer town lines. The fourth cut more lines, but had a maximum variation between its largest and smallest district of only 2.6%. The District Court thought the state plan involved unacceptably large variations between districts, although in the House, with districts of about 20,000 people, the average variation involved only 399 people, and the largest variations involved only 1,573 people.[16] But neither did the District Court adopt any of the plans submitted by appellees. Instead, it appointed its own master to come up with still another scheme. That plan, we are told, involves a total maximum deviation in the House of only 1.16%.[17] Was the master compelled, as a federal constitutional matter, to come up with a plan with smaller variations than were contained in appellees' plans? And what is to happen to the master's plan if a resourceful mind hits upon a plan better than the master's by a fraction of a percentage point? Involvements like this must end at some point, but that point constantly recedes

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16/ Among the Senate districts (of about 84,000 people each), the average deviation involves only about 400 people and the maximum deviation, only 1,532 people.

17/ Reply Brief for Appellant 19. Apparently, more refined census data was available to the master in preparing this later plan.

if those who litigate need only produce a plan that is marginally "better" when measured against a rigid and unyielding population equality standard.

The point is that such involvements should never begin. We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved. Here, the proof at trial demonstrated that the House districts under the State Apportionment Board's plan varied in population from one another by a *maximum* of only about 8% and that the average deviation from the ideal House district was only about 2%. The Senate districts had even less variations. On such a showing, we are quite sure that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made out.

III

State legislative district may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). See *White v. Regester, post, p. —; Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Abate v. Mundt*, 403 U.S. 182, 184 n. 2 (1971); *Burns v. Richardson*, 384 U.S. 73, 88-89 (1966). We must, therefore, respond to appellees' claims in this case that even if acceptable populationwise, the Apportionment Board's plan was invidiously discriminatory because a

"political fairness principle was followed in making up the districts in both the House and Senate.

The record abounds with evidence, and it is frankly admitted by those who prepared the plan, that virtually every Senate and House district line was drawn with the conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties, the only two parties in the State large enough to elect legislators from discernible geographic areas. Appellant insists that the spirit of "political fairness" underlying this plan is not only permissible, but a desirable consideration in laying out districts that otherwise satisfy the population standard of the reapportionment cases. Appellees, on the other hand, label the plan as nothing less than a gigantic political gerrymander, invidiously discriminatory under the Fourteenth Amendment.[18/]

We are quite unconvinced that the reapportionment plan offered by the three-member Board violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary.

18/ Appellees also maintain that the shapes of the districts would not have been so "indecent" had the Board not attempted to "wiggle and joggle" boundary lines to ferret out pockets of each party's strength. That may well be true, although any plan that attempts to follow Connecticut's "oddly shaped" town lines (App 98) is bound to contain some irregularly shaped districts. But compactness or attractiveness have never been held to constitute an independent federal constitutional requirement for state legislative districts. Cf. *White v. Weiser, post. p. —; Wright v. Rockefeller*, 376 U.S. 52, 54 (1964). and *id.*, at 59-61 (DOUGLAS, J., dissenting).

See *White v. Regester, post, p. —, Burns v. Richardson, supra; Whitcomb v. Chavis, supra, Abate v. Mundt, supra.* The very essence of districting is to produce a different—a more politically fair"—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.

It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event is is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

It is much more plausible to assume that those who redistrict and reapportion work with both political and census date. Within the limits of the population equality standards of the

Equal Protection Clause, they seek through compromise or otherwise, to achieve the political or other ends of the State, its constituents, and its office holders. What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment. As we have indicated, for example, multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized. See *White v. Regester, post, p. —; Whitcomb v. Chavis, supra.* See also *Gomillion v. Lightfoot,* 364 U.S. 339 (1960). Beyond this, we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States. Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so. There is no doubt that there may be other reapportionment plans for Connecticut that would have different political consequences and that would also be constitutional. Perhaps any of appellees' plans would have fallen into this category, as would the court's, had it propounded one. But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

Reversed.

NOS. 71-1476 AND 72-147

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring in

part and dissenting in part.

The Court today upholds statewide legislative apportionment plans for Connecticut and Texas, even though these plans admittedly entail substantial inequalities in the population of the representative districts, and even though the States have made virtually no attempt to justify their failure "to construct districts . . . as nearly of equal population as is practicable." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). In reaching this conclusion, the Court sets aside the judgment of the United States District Court for the District of Connecticut holding the Connecticut plan invalid, and the judgment of the United States District Court for the Western District of Texas reaching a similar result as to the Texas plan. In the Texas case, the Court does affirm, however, the District Court's determination that the use of multimember districts in Dallas and Bexar Counties had the unconstitutional effect of minimizing the voting strength of racial groups. 1/ See *Whitcomb v. Chavis*, 403 U.S. 124, 142-144 (1971); *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). With that latter conclusion I am in full agreement, as I also agree with and join Part I of the Court's opinion in No. 72-147. *White v. Regester*. But the decision to uphold the state apportionment schemes reflects a substantial and very unfortunate

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1/ In *Fortson v. Dorsey*, 379 U.S. 433 (1965), we held that a multimember district is not *per se* unconstitutional under the Equal Protection Clause, even though we had previously recognized certain inherently undesirable features of the device. See *Lucas v. Colorado General Assembly*, 377 U.S. 713, 731 n. 21 (1964). We have concluded, however, that the use of the device is, in fact, unconstitutional, where it operates to "minimize or cancel out the voting strength of racial or political elements in the voting population." *Burns v. Richardson*, 384 U.S. 73, 88 (1966), quoting from *Fortson v. Dorsey*, *supra*, at 439. Today's decision is the first in which we have sustained an attack on the use of multimember districts. Cf. *Whitcomb v. Chavis*, 403 U.S. 124, 144 (1971).

retreat from the principles established in our earlier cases, and I therefore must state my dissenting views.

I

At issue in No. 71-1476, *Gaffney v. Cummings*, is the 1971 reapportionment plan for election of delegates to the House of Representatives of Connecticut. The plan was premised on a 151-member House, with each delegate elected from a single-member district. Since the population of the State was 3,032,217, according to 1970 census data, the ideal would fix the population of each district at 20,081. In fact, the population of many districts deviated substantially from the ideal, ranging from a district underrepresented by 3.93% to one overrepresented by 3.90%. The total spread of deviation—a figure deemed relevant in each of our earlier decisions—was 7.83%. The population of 39 assembly districts deviated from the average by more than 3%. Another 34 districts deviated by more than 2%. The average deviation was just under 2%. To demonstrate that the state plan did not achieve the greatest practicable degree of equality in per district population, appellees submitted a number of proposed apportionment plans, including one that would have significantly reduced the extent of inequality. The total range of deviation under appellee's plan would have been 2.61%, as compared to 7.83% under the state plan.

The District Court held the state plan invalid on the grounds that "the deviations from equality of populations of the . . . House districts are not justified by any sufficient state interest." 2/ 341 F. Supp. 139, 148 (Conn. 1972). Instead of

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2/ With regard to the senatorial districts, the 1971 plan produced a total variance of 1.81%. Although appellees did not specifically challenge the apportionment of senatorial districts, the District Court properly

adopting one of appellees' plans, the Court appointed a Special Master to chart a new plan, and his effort produced a scheme with a total range of deviation of only 1.16%. In overturning the District Court's decision, the Court does not conclude, as it did earlier this Term in *Mahan v. Howell,* — U.S. — (1973), that the District Court failed to discern the State's sufficient justification for the deviations. Indeed in view of the State's halfhearted attempts to justify the deviations at issue here, such a conclusion could hardly be supported. Whereas the Commonwealth of Virginia made a substantial effort to draw district lines in conformity with the boundaries of political subdivisions–an effort that was found sufficient in *Mahan v. Howell* to validate a plan with total deviation of 16.4%–the evidence in the case before us requires the conclusion that Connecticut's apportionment plan was drawn in complete disregard of political subdivision lines. The District Court pointed out that "[t]he boundary lines of 47 towns are cut under the Plan so that one or more portions of each of these 47 towns are added to another town or a portion of another town to form an assembly district." 341 F. Supp., at 142. Moreover, the boundary lines of 29 of these 47 towns were cut more than once, and the Plan created "78 segments of towns in the formation of 151 assembly districts." *Ibid.*

Although appellant failed to offer cogent reasons in explanation of the substantial variations in district population, the Court nevertheless upholds the state plan. The Court reasons that even in the absence of any explanation for the failure to achieve equality, the showing of a total deviation of almost 8% does not make out a prima facie case of invidious discrimination

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2/ (Continued) concluded that its finding of unconstitutional deviation in one house required invalidation of the entire apportionment plan. *Maryland Comm'n for Fair Representation v. Tawes,* 377 U.S. 656, 673 (1964); *Lucas v. Colorado General Assembly, supra,* at 735. *Burns v. Richardson, supra,* at 83.

under the Fourteenth Amendment. Deviations no greater than 8% are, in other words, to be deemed *de minimis,* and the State need not offer any justification at all for the failure to approximate more closely the ideal of *Reynolds v. Sims, supra.*

The Texas reapportionment case, No. 72-147, *Bullock v. Regester,* presents a similar situation, except that the range of deviation in district population is greater and the State's justifications are, if anything, more meagre. An ideal district in Texas, which chooses the 150 members of the State House of Representatives from 79 single-member and 11 multimember districts, is 74,645. As defined in the State's 1970 plan, a substantial number of districts departed significantly from the ideal. The total range of deviation was at least 9.9%, and arguably almost 30%, depending on the mode of calculation. 3/ The District Court pointed out that

> "[i]n all of the evidence presented in this case, the State has not attempted to explain in terms of rational State policy its failure to create districts equal in population as nearly as practicable, nor has the State sought to justify a single deviation from precise mathematical equality. The lengthy depositions of the members of the legislative redistricting board and of the staff members who did the actual drawing of the legislative district lines are devoid of any meaningful indications of the standards used." 343 F. Supp. 704, 714 (WD Tex. 1972).

3/ The District Court pointed out that "the State's method of computing deviations in the multi-member districts may distort the actual percentage deviations in those eleven districts . . . . Since we have concluded that the 9.9% total deviation is not the result of a good faith attempt to achieve population equality as nearly as practicable, it is unnecessary for us to resolve this complex computational conflict." 343 F. Supp., at 713 n. 5. A similar conflict existed in *Mahan v. Howell, supra,* as I pointed out in my dissenting opinion, *id.,* at —, and there too the Court declined to indicate any awareness of the dispute.

As the District Court's opinion makes clear, the variations surely cannot be defended as a necessary byproduct of a state effort to avoid fragmentation of political subdivisions. Nevertheless, the Court today sets aside the District's Court decision, reasoning, as in the Connecticut case, that a showing of as much as 9.9% total deviation still does not establish a prima facie case under the Equal Protection Clause of the Fourteenth Amendment. Since the Court expresses no misgivings about our recent decision in *Abate v. Mundt*, 403 U.S. 182 (1971), where we held that a total deviation of 11.9% must be justified by the State, one can reasonably surmise that a line has been drawn at 10%—deviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever.

II

The proposition that certain deviations from equality of district population are so small as to lack constitutional significance, while repeatedly urged on this Court by States that failed to achieve precise equality, has never before commanded a majority of the Court. 4/ Indeed, in *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969), we expressly rejected the argument

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4/ There is a statement, to be sure, in *Swann v. Adams*, 385 U.S. 440, 444 (1967), that "[*d*]*e minimis* deviations are unavoidable," but that statement must be viewed in context. By way of clarification, the Court immediately added that "the *Reynolds* opinion limited the allowable deviations to those minor variations which are based on legitimate considerations incident to the effectuation of a rational state policy. 377 U.S. 533, 579." *Ibid.* Similarly the Court noted, quoting from *Roman v. Sincock*, 377 U.S. 695, 710 (1964), that "the Constitution permits 'such minor deviations only as may occur in recognizing certain factors that are free from any taint or arbitrariness or discrimination.' " 385 U.S., at 444 *Swann v. Adams* does not, in my view, suggest any support for the proposition that deviations as great as 10% are tolerable even in the absence of any justification or explanation by the State.

> "that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard. The whole thrust of the 'as nearly as practicable' approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case.

The Court reasons, however, that *Kirkpatrick v. Preisler*, *supra*, a case that concerned the division of Missouri into congressional districts, has no application to the apportionment of seats in a state legislature. In my dissenting opinion in *Mahan v. Howell*, *supra*, I pointed out that the language, reasoning, and background of the *Kirkpatrick* decision all command the conclusion that our holding there is applicable to state legislative apportionment no less than to congressional districting. In fact, this Court specifically recognized as much in the context of a challenge to an Arizona apportionment scheme in *Ely v. Klahr*, 403 U.S. 108 (1971). Describing the opinion of the District Court whose judgment was under review, we noted that the court below had "properly concluded that this plan was invalid under *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *Wells v. Rockefeller*, 394 U.S. 542 (1969), since the legislature had operated on the notion that a 16% deviation was *de minimis* and consequently made no effort to achieve greater equality." 403 U.S., at 111. Yet it is precisely such a notion that the Court today approves. 5/

5/ By contrast, in *Mahan v. Howell*, *supra*, the Court expressly reaffirmed the holding of *Reynolds v. Sims*, *supra*, that "deviations from the equal-population principle are constitutionally permissible" "*[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy.*" 377 U.S., at 579, quoted in *Mahan v. Howell*, at — (emphasis added). In my view, the Court incorrectly concluded in *Mahan v. Howell* that Virginia

Moreover, even if *Kirkpatrick* should be deemed inapplicable to the apportionment of state legislative districts, the reasoning that gave rise to our rejection of a *de minimis* approach is fully applicable to the case before us. We pointed out there that the "as nearly as practicable" standard—the standard that controls legislative apportionment as well as congressional districting. *Reynolds v. Sims, supra,* at 577—demands that "the State make a good-faith effort to achieve precise mathematical equality. . . . Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes." 394 U.S., at 530-531. *Kirkpatrick* recognized that "to consider a certain range of variances *de minimis* would encourage legislators to strive for that range rather than for equality as nearly as practicable." 394 U.S., at 531.

Although not purporting to quarrel with the principle that precise mathematical equality is the constitutionally mandated goal of reapportionment, the Court today establishes a wide margin of tolerable error, and thereby undermines the effort to effectuate the principle. For it is clear that the state legislatures and the state and federal courts have viewed *Kirkpatrick* as controlling on the issue of legislative apportionment and the outgrowth of that assumption has been a truly extraordinary record of compliance with the constitutional mandate. Appellees in No. 71-1476 make the point forcefully by comparing the

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5/ (Continued) had justified the population variations at issue there. Nevertheless, the Court did follow the line of analysis prescribed in our earlier decisions—requiring the State to justify every deviation from precise equality. The approach of *Mahan* is, therefore, directly at odds with the approach adopted today. See also, *e.g., Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Kilgarlin v. Hill*, 386 U.S. 120, 122 (1967); *Swann v. Adams*, 385 U.S. 440, 443-446 (1967).

extent of inequality in the population of legislative districts prior to 1969, the year of our decision in *Kirkpatrick*, with the extent of inequality in subsequent years.6/ Prior to 1969, the range of variances in population of state senatorial districts exceeded 15% in 44 of the 50 States. Three States had reduced the total variance to between 10 and 15%; two had cut the variance to between 5 and 10%; only one had reduced the variance below 5%. The record of apportionment of state house districts was even less encouraging. Variances in excess of 15% characterized all but two of the States, and only one of these had brought the total variance under 10%. The improvement in the post-1969 years could not have been more dramatic. The table provided by appellees, set out in full in the margin,7/ reveals that in almost one-half of the States the total variance in population of senatorial districts was within 5% of zero. Of the 45 States as to which information was

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6/ Appellees figures are compiled from a table entitled "Apportionment of Legislatures" in 17 Council of State Governments. The Book of the States: 1968-1969, at 66-67 (1968), and from Council of State Governments. Reapportionment in the Seventies (1973).

7/ Deviations After 1970

Range of Deviations	Number of States	Percentage of States
	Senate:	
Under 1%	3	6.7%
1-5%	21	46.7%
5-10%	8	17.8%
10-15%	5	11.1%
Over 15%	8	17.8%
	House:	
Under 1%	4	9.5%
1-5%	16	38.1%
5-10%	8	19.1%
10-15%	4	9.5%
Over 15%	10	23.8%

available, 32 had reduced the total variance below 10% and only eight had failed to bring the total variance below 15%. With regard to house districts the improvement is similar. On the basis of information concerning 42 States, it appears that 20 had achieved a total variance of less than 5%, and only 14 retained districts with a total variance of more than 15% from the constitutional ideal.

To appreciate the significance of this encouraging development, it is important to understand that the demand for precise mathematical equality rests neither on a scholastic obsession with abstract numbers nor a rigid insensitivity to the political realities of the reapportionment process. Our paramount concern has remained an individual and personal right–the right to an equal vote. "While the result of a court decision in a state legislative apportionment controversy may be to require the restructing of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." *Reynolds v. Sims, Supra*, at 561. We have demanded equality in district population precisely to insure that the weight of a person's vote will not depend on the district in which he lives. The conclusion that a State may, without any articulated justification, deliberately weight some persons' votes more heavily than others, seems to me fundamentally at odds with the purpose and rationale of our reapportionment decisions. Regrettably, today's decision is likely to jeopardize the very substantial gains that have been made during the last four years.

Moreover, if any approach ascribes too much importance to abstract numbers and too little to the realities of malapportionment, it is not *Kirkpatrick's* demand for precise equality in district population, but rather the Court's own *de minimis* approach. By establishing an arbitrary cut-off point expressed

in terms of total percentage variance from the constitutional ideal, the Court fails to recognize that percentage figures tend to hide the total number of persons affected by unequal weighting of votes. In the Texas case, for example, the District Court pointed out that

> "The total deviations for Dallas and Bexar Counties, respectively, amount to about 16,000 people and 5,500 people, for a total of around 21,500 people. The percentage deviation figures are only a shorthand method of expressing the 'loss,' dilution, or disproportionate weighting of votes. Just as the Court in *Reynolds* concluded that ligislators represent people, not trees or cows, so we would emphasize that legislators represent people, not percentages of people." 343 F. Supp., at 713 n. 5.

Finally, it is no answer to suggest that precise mathematical equality is an unsatisfactory goal in view of the inevitable inaccuracies of the census data on which the plans are based. That argument, which we implicitly rejected in *Kirkpatrick v. Preisler, supra,* 8/ mixes two distinct questions. In the first place, a state apportionment plan must be grounded on the most accurate available data, and the unreliability of the data may itself necessitate the invalidation of the plan. But once the data is established, the State's constitutional obligation is to achieve the highest practicable degree of equality with reference to the information at hand. In my view, the District Courts properly concluded that neither Texas nor Connecticut had satisfied this obligation. I would therefore affirm both Judgments.

8/ See *Kirkpatrick v. Preisler, supra* at 538-540 (Fortas, J., concurring); *Wells v. Rockefeller, supra*, at 554 (White, J., dissenting).

ROBERT G. DIXON, Washington, D.C. (HARRY W. HULTGREN, JR. and FRANCIS J. McCARTHY, with him on the brief) for appellant; ROBERT A. SATTER, Hartford, Conn. (JAMES A. WADE, with him on the brief) for appellee.

WEST KEY NUMBER SYSTEM

George WALLACE, Sr., et al.,
v.
J.P. HOUSE, Individually and as Registrar of Voters of Concordia Parish, Louisiana, et al.,
Civ. A. No. 17971

UNITED STATES DISTRICT COURT.
W.D. Louisiana,
Monroe Division
June 6, 1974

A class action civil rights suit was brought claiming deprivation of rights of black plaintiffs arising out of at-large election of town aldermen. The District Court, Dawkins, Senior District Judge held that at-large scheme of electing aldermen in town effectively deprived plaintiffs and their class of right to vote, on account of race, in that it invidiously cancelled out voting strength of blacks within town, that plan for election of town aldermen which divided town into five single-member districts with no at-large feature was not constitutionally infirm; that in cases where very election process itself is found to be constitutionally infirm, such as malapportionment, and governing body has been elected under either a malapportioned plan, or an election scheme such as at-large elections, cancelling out voting strength of a cognizable portion of populace, thus denying them access to political process, prompt new elections are appropriate; and that attorneys' fees and litigation expenses were awarded successful plaintiffs under broad considerations of equity contained in common benefit and private attorney general theories.

Judgment accordingly.

1. Elections Key 12

At-large scheme of electing aldermen in town effectively deprived plaintiffs and their class of right to vote, on account of race, in that it invidiously cancelled out voting strength of

blacks within town. 28 U.S.C.A. §§ 1343 (3, 4), 2201; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 14, 15; LSA–R.S. 18:358, 33:51 et seq.

2. Elections Key 12

At-large election scheme for election of town aldermen was maintained by individual defendants under color of law of state, and of town, and under color of defendants' respective offices as officers and agents of state. 42 U.S.C.A. § 1983.

3. Elections Key 12

Fact that a single black candidate had been successful in an at-large race for town aldermen was insufficient to demonstrate that particular at-large system did not operate to minimize or cancel out minority voting strength. 28 U.S.C.A. §§ 1343 (3, 4), 2201; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 14, 15; LSA–R.S. 18:358, 33:51 et seq.

4. Elections Key 12

At-large elections are not per se racially discriminatory. 28 U.S.C.A. §§ 1343 (3, 4), 2201; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 14, 15; LSA–R.S. 18:358, 33:51 et seq.

5. Elections Key 12

On claim of racial discrimination directed against at-large elections for town aldermen, plaintiffs met burden to produce evidence that political process as used in nomination and election were not equally open to participation by complaining group and that such group had less opportunity than did other residents meaningfully to participate in political process and to elect public officials of their choice. 28 U.S.C.A. §§ 1343 (3, 4), 2201; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 14, 15, LSA–R.S. 18:358, 33:51 et seq.

6. Elections Key 12

Record established that at-large plan for election of town

aldermen did not leave black citizens at liberty to participate in electoral process on same plane with white citizens. 28 U.S.C.A. §§ 1343 (3, 4), 2201; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 14, 15; LSA–R.S. 18:358, 33:51 et seq.

7. Elections Key 12

Dilution of vote of a racial minority is not shown by a mere disparity between number of minority residents and number of minority representatives or by fact that racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. 28 U.S.C.A. §§ 1343 (3, 4), 2201; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 14, 15; LSA–R.S. 18:358, 33:51 et seq.

8. Elections Key 12

A claim of abridgment of minority vote is valid only when the political processes leading to nomination and election were not equally open to participation by group in queston and its members had less opportunity than did other residents in district to participate in political processes and to elect legislators of their choice. 28 U.S.C.A. §§ 1343 (3, 4), 2201; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 14, 15; LSA–R.S. 18:358, 33:51 et seq.

9. Municipal Corporations Key 80

Plan for districting town which divided town into four single-member districts and provided that fifth aldermen would be elected from town at-large was constitutionally unacceptable because of its at-large feature. U.S.C.A. Const. Amend. 15.

10. Elections Key 12

Fifteenth Amendment prohibits abridgment of right to vote as well as its outright denial. U.S.C.A. Const. Amend. 15.

11. Elections Key 10½

Right of suffrage can be denied by a debasement or dilution

of weight of citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. U.S.C.A. Const. Amend. 15.

12. Municipal Corporations Key 80

Plan for election of town aldermen which divided town into five single-member districts with no at-large feature was not constitutionally infirm. 28 U.S.C.A. §§ 1343 (3, 4), 2201; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 14, 15; LSA–R.S. 18:358, 33:51 et seq.

13. Elections Key 10½

Where a governing authority is found to be holding office by virtue of an election scheme which constitutionally is infirm, court under its equitable authority should take steps to correct such defects at earliest feasible date. U.S.C.A. Const. Amend. 15.

14. Consitutional Law Key 102(1)

No officeholder has a vested right in an unconstitutional office any more than he has a right to be elected to that office.

15. Municipal Corporations Key 80

In cases where very election process itself is found to be constitutionally infirm, such as malapportionment, and governing body has been elected under either a malapportioned plan, or an election scheme such as at-large elections, cancelling out voting strength of a cognizable portion of populace, thus denying them access to political process, prompt new elections are appropriate. 28 U.S.C.A. §§ 1343 (3, 4), 2201; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 14, 15; LSA–R.S. 18:358, 33:51 et seq.

16. Federal Civil Procedure Key 2737

In the absence of statute, federal courts have equitable powers to award attorneys' fees.

17. Civil Rights Key 13.17

In civil rights suit claiming deprivation of rights of black plaintiffs arising out of at-large election of town aldermen, attorneys' fees and litigation expenses were awarded successful plaintiffs under broad considerations of equity contained in common benefit and private attorney general theories. 28 U.S.C.A. §§ 1343 (3, 4), 2201; 42 U.S.C.A. § 1983; U.S.C.A. Const. Amends. 14, 15; LSA–R.S. 18:358, 33:51 et seq.; Fed. Rules Civ. Proc. rule 54(d), 28 U.S.C.A.

18. Federal Civil Procedure Key 2737

Once it has been determined that attorneys' fees are to be allowed, standard for determining amount of fees is same whether authorization of award is contained in a statute or is within sound equitable discretion of court.

19. Federal Civil Procedure Key 2737

On question of amount of award of attorneys' fees, consdderations include results obtained at trial and insurance of adequate renumeration to those attorneys representing prevailing party.

20. Civil Rights Key 13.17

In civil rights suit claiming deprivation of rights of black plaintiffs arising out of at-large election of town aldermen, attorneys' fees were awarded plaintiffs' counsel in amount of $50 per hour for 138.5 hours expended.

Paul Henry Kidd, Kidd, Katz & Halpin, Monroe, La., Stanley A. Halpin, Jr., New Orleans, La., for plaintiffs.

W.C. Falkenheiner, Dist. Atty., Seventh Judicial Dist., Vidalia, La., Robert C. Downing, Asst. Atty. Gen. of La., Monroe, La., A. Mills McCawley, Sp. Counsel to the Atty. Gen. of La., Shreveport, La., for defendant J.P. House.

Norman M. Magee, Ferriday, La., for all other defendants.

DAWKINS, Senior District Judge.

FINDINGS OF FACT and CONCLUSIONS OF LAW

1. This class action is brought pursuant to 42 U.S.C. § 1983. Plaintiffs seek a declaratory judgment, pursuant to 28 U.S.C. § 2201, a preliminary injunction, a permanent injunction, and other appropriate relief to enjoin the deprivation, under color of law, by the State of Louisiana (and in particular the Town of Ferriday) of the rights, privileges, and immunities of the plaintiffs and the class they represent, arising under the Constitution of the United States and, more particularly, the Fourteenth and Fifteenth Amendments. Jurisdiction is conferred in this Court by 28 U.S.C. § 1343(3) and (4).

2. Plaintiffs Henry A. Montgomery, Clarence L. Hymon, L.J. Scott, Leon Smith are black citizens of the Unites States and residents and registered voters in the Town of Ferriday, Concordia Parish, Louisiana. All were candidates for the Board of Aldermen for the Town of Ferriday March 25, 1972. All were unsuccessful. Louis Hill, Jr., another plaintiff, has died since this suit was filed.

3. Plaintiffs George Wallace, Sr., Jesse L. Bloodshaw, and Louis R. Jones are black citizens of the United States, and residents and registered voters in the Town of Ferriday. They were unsuccessful candidates for the Democratic Executive Committee for the Town at the Election held March 25, 1972.

4. The plaintiffs sue individually and as representatives of the class of black voters of the Town, and as potential candidates for the Board of Aldermen.

5. The Town of Ferriday is a municipal corporation and is recognized by the State of Louisiana pursuant to L.S.A.–R.S. 33:51 et seq. (Lawrason Act.)

6. Defendant J. P. House is a white citizen of Ferriday. He is the Registrar of Voters of Concordia Parish and was sued both in his capacity as Registrar and individually.

7. Defendant L.W. Davis is Mayor of Ferriday. He has responsibility for the control, care, and management of the Town as provided by L.S.A.–R.S. 33:321 et seq. He is sued in his individual and official capacities.

8. Defendants Raymond Galloway, Glenn E. Ratcliff, Raymond Cooper, George M. Scruggs, and Guy R. Serio are the present members of the Board of Aldermen for the Town. As such they constitute the legislative governing body of the Town, pursuant to L.S.A.–R.S. 33:321 et seq. They also have the duty and responsibility of determining the districting arrangement for the election of Aldermen. They are sued in their individual and official capacities.

9. Defendants John F. Anders, Purser Raborn, and A.E. Torres are the present members of the Democratic Executive Committee for the Town. They are sued individually and in their capacities as Democratic Executive Committeemen.

10. The five members of the Ferriday Board of Aldermen are currently elected on an at-large basis, with no residency requirements, by the electors living within the Town limits. The Town being a Lawrason Act city, as indicated, the Board of Aldermen performs purely legislative functions. All of the present Aldermen are white, and only one black ever has been elected to serve on the Board, and no black ever has been elected to any other office in the Town.

11. According the the 1970 census, the total population of the Town is 5,239. Of this total 2,211 are white, and 3,028 are black. Thus, although a significant proportion of the population is black, there is no black member now serving on the

Board of Aldermen, and only one black ever has served on the Board.

[1] 12. The at-large scheme of electing Aldermen in the Town effectively deprives plaintiffs and their class of the right to vote, on account of race, in that it invidiously cancels out the voting strength of blacks within the Town.

13. Practically all of the black population of the Town lives in two geographically discernable areas: (1) the area east of the railroad tracks, and (2) the area in the southwest portion of the town. These areas are known to be the black residential areas of the Town.

14. There has been a continuing history of State and local official racial discrimination in Ferriday and the Parish of Concordia, which, until fairly recent times, has extended to deprivation of the rights of blacks to register and vote and to participate in the democratic process.

15. Ferriday is a one-party town, with nominations by the Democratic Party being tantamount to election.

16. Black voters of Ferriday vote consistently for the Democratic Party nominee for Aldermen and other political offices. The Democratic nominees are consistently elected, yet they fail to respond properly to the needs of the black community.

17. Other voting practices and procedures of the State of Louisiana and the Town of Ferriday compound and multiply the racially discriminatory effect of the at-large scheme of elections for Aldermen in the Town.

18. Specifically, by L.S.A.–R.S. 18:358, Louisiana law provides for a majority rather than a plurality requirement in primary elections. Under this provision, any candidate who

receives a mere plurality must stand for election in a second primary. The white voter registration and voting in the at-large scheme thus effectively prohibits any black candidate from gaining election.

19. Also by L.S.A.–R.S. 18:351, Louisiana law provides for "anti-single shot" of "full slate" voting, which in at-large elections forces the voter to cast ballots for candidates whom he does not support as well as for candidates he supports. The law prevents the racial voting minority in at-large elections from concentrating their support for a single minority candidate.

20. The at-large election scheme currently employed by the Town Board of Aldermen, particularly in combination with the above described practices, effectively excludes the black community from participation in the political process of electing Aldermen in a reliable and meaningful manner.

21. The above described black residential areas in the Town have well over a majority of the voting strength within those areas, but blacks in those areas are generally unable to elect a representative to the Board of Aldermen, and will continue to be unable to do so as a result of the at-large voting scheme.

22. Accordingly, the at-large scheme of election ensures that the white voters will continue to elect all members to the Board of Aldermen, while plaintiffs and their class will continue to have neither the opportunity nor ability to be elected, all in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and in deprivation of their rights thereunder.

23. The present at-large election scheme of the Town operates to minimize or cancel out the black voting strength in the Town, which deprives plaintiffs of their rights under the Fourteenth, and particularly the Fifteenth, Amendments, in that,

when taken in combination with other voting laws of Louisiana, deprives plaintiffs and their class of the opportunity to elect blacks to the Ferriday Board of Aldermen, even though blacks comprise a significant proportion of the total population of the Town. This further deprives plaintiffs and their class, as potential black candidates, of the opportunity meaningfully to run for a position on the Board of Aldermen because of the design and effect of the at-large plan, thus relegating black electors to permanent minority status with no voice or influence upon defendants, all of which deprives plaintiffs of their rights under the Fourteenth and particularly the Fifteenth Amendments.

24. It is quite feasible to devise a single-member district plan for election of Aldermen in the Town of Ferriday, under which the rights of plaintiffs would not be violated.

[2] 25. The at-large election scheme described in the above paragraphs is maintained by the individual defendants under the color of law of the State of Louisiana, and of the Town of Ferriday and under color of defendants' respective offices as officers and agents of the State.

26. On only one occasion, a black, Henry Montgomery, was elected to the Board of Aldermen, for a single four-year term. The evidence, however, indicates that his election on this occasion was due to a mere "stroke of luck" in that there were originally seven white candidates and Montgomery vying for five seats on the Board. Shortly before the election, one of the strongest white candidates withdrew because of a ruling that, as the Town's Fire Chief, he could not hold a second public office. His name remained on the ballot, however; and, because white voters divided their votes between this unqualified white candidate and the seventh white candidate, Montgomery, by obtaining a large percentage of the black vote within the Town, was able to place within the first five, and thus was elected.

[3] 27. That a single black candidate has been successful in an at-large race, by no means demonstrates that the particular at-large system does not operate to minimize or cancel out minority voting strength. Zimmer v. McKeithen, 485 F. 2d 1297 (5th Cir., en banc, 1973), and Beer et al. v. United States of America et al. and Johnny Jackson, Jr. et al., 374 F. Supp. 363, at 397-398 (U.S.D.C., D.C., 1974).

28. Witnesses for plaintiffs credibly stressed the long history of racial segregation in education, housing, public facilities, and virtually all facets of everyday life in Ferriday. With special reference to suffrage, witnesses attested to past voting practices which worked to exclude blacks from the registration rolls and to stifle minority participation in the elections. Until very recently, strict proof of residency of specific duration, identification by Social Security number, and other impediments had persisted as obstacles to would-be voters.

29. Further testimony at the trial indicated that the present selection process for Aldermen in Ferriday creates additional problems for its black citizens. To maximize exposure throughout the Town of Ferriday, and to gain other benefits from joining forces, white aspirants for Aldermen frequently form informal tickets to campaign essentially as a team. There have been no instances where any black candidate has been included upon any of these teams, and black citizens running for office are hampered by both their general, more individualistic political philosophies, and their more limited financial resources.

30. The record documents a history of bloc voting along racial lines, wherein the situation where a black candidate opposes a white candidate, virtually all of the white voters cast their vote for the white candidate, and virtually all of the black voters cast their vote for the black candidate.

31. To this variety of factors limiting black access to the political process, there are certain structural elements of a statutory origin which contribute to and build upon the informal factors, and which have the result under the totality of the circumstances of this case, of operating to dilute and abridge the voting power of the black voting strength in the Town of Ferriday. These are the majority vote requirement, La. Rev. Stat. Ann. Art. 18 § 358 (1966 Supp.), and the "anti-single shot" provision, La. Rev. Stat. Ann. Art. 18, § 351 (1966 Supp.), which are applicable in primary elections. As further amplified by plaintiffs' political science expert, Dr. Richard Engstrom, the majority-vote rule seriously limits a black candidate's chances of winning, even if he were to receive all of the black vote. Without the possibility of a plurality victory by his candidate, the minority voter's influence on the election result sharply is reduced.

32. The "anti-single shot" law provides that if two or more offices are to be filled, as, for example, the five at-large seats for the Board of Aldermen, a voter must vote for candidates equal in numbers to the number of offices at stake, or his ballot will be invalidated with respect to all of those offices. As further amplified by plaintiffs' expert, Dr. Engstrom, although a voter wishes to support but one aspirant for an at-large seat, he must cast a vote against his candidate in order to have his vote for that candidate counted. The effect of this is that black voters are unable to run a single candidate and urge that black voters only vote for that candidate.

33. By virtue of the existence of a formerly law-required literacy test, and low voter registration, all of Louisiana, as well as Concordia Parish and the Town of Ferriday, has been made subject to the Voting Rights Act of 1965. Particularly, the Town was singled out for the presence of Justice Department attorneys to observe voting and election procedures as recently as 1972.

[4, 5] 34. At-large elections, of course, are not *per se* racially discriminatory, see Whitcomb v. Chavis, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363, Burns v. Richardson, 384 U.S. 73, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966), Fortson v. Dorsey, 379 U.S. 433, 85 S. Ct. 498, 13 L. Ed. 2d 401 (1965). The Supreme Court has held that in such case, the plaintiffs' burden is to produce evidence that the political processes used in nomination and election were not equally open to participation by the group in question—that is, that the group had less opportunity than did other residents meaningfully to participate in the political process and to elect public officials of their choice. We find here that the plaintiffs have met this burden of proof.

35. The Fifth Circuit Court of Appeals has pointed out that " . . . although population is the proper measure of equality in apportionment . . . access to the political process and not population [is] the barometer of dilution of minority voting strength." Zimmer v. McKeithen, *supra*, at 1303, and that the final determination is to be made " . . . on the totality of the circumstances," White v. Regester, 412 U.S. 755, at 769, 93 S. Ct. 2332, 37 L. Ed. 2d 314, and Turner v. McKeithen, 490 F. 2d 191, at p. 194 (5th Cir., 1973); and among the factors relevant to the question whether a minority group enjoys meaningful access, " . . . are the continuing effects of past discrimination on the minority group's ability to participate in the political process, the opportunity for the minority group to participate in the candidate selection process, the responsiveness of elected officials to the particular concerns of the minority group, and the strength of the stated interest in multi-member or at-large voting." Turner v. McKeithen, *supra*, at p. 194.

[6] 36. Thus, the measure of the validity of an at-large plan of election is the quality of opportunity, and the crucial inquiry is whether the plan leaves black citizens at liberty to participate in the electoral process on the same plane with white citizens. We find here that it does not.

[7, 8] 37. Ferriday has a sizable black population and a sizable number of black voters, yet, with the single exception of the Montgomery election, indicated above, no black ever has been elected to public office in the Town since Reconstruction. However, dilution of the vote of a racial minority is not shown by " . . . a mere disparity between the number of minority residents and the number of minority representatives," Zimmer v. McKeithen, *supra*, at 1305, or by the fact that " . . . the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." White v. Regester, *supra*, at 765-766. Rather a claim of abridgment of minority vote is valid only when " . . . the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." White v. Regester, *supra*, at 766.

38. Careful examination of a variety of circumstances, giving due attention and weight to those factors, leads us here to conclude that the at-large election plan now in effect at Ferriday inevitably will have the effect of minimizing the voting strength of black citizens in Aldermanic elections.

39. The pertienent historical events demonstrate not only " . . . that . . . blacks [have] suffered a history of official racial discrimination which touched their right to participate in democratic processes," Zimmer v. McKeithen, *supra*, at 1305, 1306; White v. Regester, *supra*, at 766; Turner v. McKeithen, *supra*, at 194, 197; but also that the " . . . existence of past discrimination in general precludes the effective participation in the elect[ive] system." Zimmer v. McKeithen, *supra*, at 1305.

40. For generations, black citizens of Ferriday were segregated in public schools, public recreational facilities, and in other aspects of daily life, see, Smith v. Concordia Parish School

Board (No. 11,577, U.S.D.C., W.D. La., commenced in 1965 and continuing to date). For a long period, they were victimized by governmentally sanctioned residential segregation; and even at present by discrimination in public employment, according to plaintiffs' credible witnesses.

41. Even more directly related to minority suffrage in Ferriday is Louisiana's traditional and " . . . successful policy of denying Negro citizens the right to vote because of their race." Louisiana v. United States, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965). Further, the grandfather clause, Louisiana v. United States, *supra*, at 148, the literacy standard, La. Const. art. VIII, § 1(c) (1961), the white primary, Louisiana v. United States, *supra*, at 148-149, and the "segregation committee." *Ibid.*, at 149, combined with each other and other devices to limit black political activity in Louisiana to a distressingly low level.

42. While the Voting Rights Act of 1965 has invalidated many of these discriminatory provisions, their debilitating effect remains.

43. Thus, it is clear that plaintiffs have met their burden of proof, and that at-large elections in Ferriday, under the totality of circumstances, in combination with the formal and informal conditions existing in the Town, operate to minimize and dilute the voting strength of black citizens there and to prevent them from participating equally with white citizens in the political process relative to selection of Aldermen.

44. Upon order, the Aldermen of Ferriday submitted to this Court two plans of districting for the Town of Ferriday. The plan first submitted (hereinafter the first plan) divided the town into four single-member districts and provided that the fifth Alderman would be elected from the Town at large. They then submitted to this Court another plan (hereinafter the

second plan) which divided the Town of Ferriday into five single-member districts.

[9-11] 45. We find that the first plan submitted by the Aldermen constitutionally is unacceptable because of its at-large features, for all of the reasons indicated above in regard to the presently totally at-large plan. The Fifteenth Amendment to the United States Constitution provides in part that "[t]he right . . . to vote shall not be denied *or abridged* by . . . any State on account of race [or] color." (Emphasis added.) Thus, the Fifteenth Amendment prohibits abridgment of the right to vote as well as its outright denial, and in the context of this case, the election of one Alderman at-large clearly abridges the right to vote. The Supreme Court held in Reynolds v. Sims that: "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, at 555, 84 S. Ct. 1362, at 1378, 12 L.Ed.2d 506. See also the language in Allen v. State Board of Elections, 393 U.S. 544, at 569, 89 S.Ct. 817, 22 L.Ed. 2d 1.

46. The first plan of defendants, containing the at-large provision, also is clearly constitutionally infirm because of the special racially discriminatory effect of that plan in the context of this case. The black population and voting strength in Ferriday is distributed in such a manner that it appears that any fairly drawn single-member district plan of redistricting ordinarily will result in blacks having a majority in three of the five districts. Only clear racially discriminatory gerrymandering could accomplish a different result. Plaintiffs' expert, Engstrom, explained that political scientists recognize two types of gerrymandering. The first is called "*ad hoc*" gerrymandering, which refers to manipulation of district lines to achieve the desired political effect. To use this system in Ferriday, using five single-member districts to accomplish the end of three districts each containing a white voting majority, while theoretically possible,

most immediately would be recognized (visually and otherwise) as a blatant gerrymandering. The second type of gerrymandering referred to by Engstrom is called "institutional" gerrymandering, which refers to devices other than manipulation of district lines in order to achieve a given political effect. A typical form of "institutional" gerrymandering is multi-member districts or at-large elections. John Wildgen in "Measuring Malapportionment in Louisiana," 16 Loyola L. Rev. 383, 394-395 (1969-70) explains this type of institutional gerrymandering as follows: "Where the black voting concentrations are too high to be subdivided into two or more districts which have an overall white majority, the alternate choice of those bent on maintaining white control is to 'take the opposite course and create large districts in which the black minority becomes diluted by the overwhelming number of white suburbanites. Instead of dividing the blacks, Louisiana has simply introduced more whites.'"

47. This course of action, suggested by defendants' "first plan," may not be tolerated. The inclusion of the at-large seat is merely a slightly more sophisticated device (that is, institutional gerrymandering) for accomplishing what obviously would be impermissible if done by manipulation of district lines (that is, "*ad hoc*" gerrymandering). As Justice Frankfurter noted long ago, the Fifteenth Amendment " . . . nullifies sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83 L.Ed. 1281 (1939).

[12] 48. The second plan submitted by the Alderman, which is composed of five separate single-member districts with no at-large feature, does not suffer from these or any other constitutional defects. Plaintiffs have indicated at trial that they have no quarrel with this plan. In fact, it is quite similar to the five single-member districts plan proposed by plaintiffs.

[13] 49. Where, as here, a governing authority is found to be holding office by virtue of an election scheme which constitutionally is infirm, the Court under its equitable authority should take steps to correct such defects at the earliest feasible date.

[14] 50. As was stated in Reynolds v. State Election Board, 233 F. Supp. 323 (W.D. Okl., 1964) (three-judge Court), "No office holder has a vested right in an unconstitutional office any more than he has a right to be elected to that office." See also, Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966), cert. denied, 385 U.S. 851, 87 S.Ct. 76, 17 L.Ed.2d 79 (1966); Bell v. Southwell, 376 F.2d 659 (5th Cir., 1967); Brown v. Post, 279 F. Supp. 60 (W.D. La., 1968); United States v. Democratic Executive Commitee of Barbour County, Alabama, 288 F. Supp. 943 (M.D. Ala., 1968) United States v. Post, 297 F.Supp. 46 (W.D. La., 1969).

51. Even after officials have assumed office under unconstitutional redistricting schemes, federal courts have ordered new elections drastically shortening their terms of office. Swann v. Adams, 263 F.Supp. 225 (S.D. Fla., 1967) (three-judge court) (on remand); W. M. C. A., Inc. v. Lomenzo, Order of July 27, 1964 (unreported), aff'd 379 U.S. 694, 85 S.Ct. 713, 13 L.Ed.2d 698 (1965). In Herweg v. Thirty Ninth Legislative Assembly of Montana, 246 F. Supp. 454 (D. Mont.) (three-judge court), the Court declared that all State legislators had been elected invalidly from malapportioned districts, and that " . . . regardless of the term for which they purported to be elected, [none] may hold office or be recognized as a member of said Legislature after the 31st day of December, 1966."

52. In recent rulings the Fifth Circuit Court of Appeals

has reversed orders of District Courts in Mississippi and ordered prompt new elections where supervisors had been elected under unconstitutional districting schemes. In Hall v. Issaquena County (unreported, Order of July 29, 1971, No. 71-3212) (Gewin, Coleman, and Godlberg, JJ.) and in Howard v. Adams County (unreported, Order of July 29, 1971, No. 71-2363, same panel), the Fifth Circuit ordered that new elections under a valid plan be conducted in each of these counties at an early date.

[15] 53. In cases where the very election process itself is found to be constitutionally infirm (such as malapportionment), calling out even more strongly for prompt remedial action than those in which there is found to be some racial discrimination which does not go to the heart of the election process itself, this Court and other District Courts have found that where a governing body has been elected under either a malapportioned, plan, or an election scheme such as at-large elections, cancelling out the voting strength of a cognizable portion of the populace, thus denying them access to the political process, prompt new elections are appropriate. See, Baker v. St. Helena Parish Police Jury (unreported, E.D. La., December 1, 1972, E. Gordon West, J., C.A. No. 71- 293); Clark v. DeSoto Parish Police Jury (unreported, W.D. La., January 28, 1972, Ben C. Dawkins, Jr., J., C.A. No. 17,266); Fain v. Caddo Parish Police Jury, 312 F. Supp. 54 (W.D. La., 1970, Ben C. Dawkins, Jr., J.); London v. East Feliciana Parish Police Jury, 347 F. Supp. 132 (E. D.La., 1972, West, J.), reversed and remanded on other grounds, 476 F.2d 637 (5th Cir., 1973); Bailey v. Washington Parish Police Jury (unreported, E.D. La., June 19, 1972, Edward Boyle, J., C.A. No. 70-2861); Hargrove v. Caddo Parish School Board (unreported, W.D. La., June 7, 1972, Dawkins, J., C.A. No. 17,630); Johnson v. St. Martin Parish School Board (unreported, C.A. No. 16,965 W.D. La., June 5, 1972, Richard J. Putnam, J.); Chargois v. Vermilion Parish School Board, 348 F.Supp 498 (W.D.La., 1972, Putnam, J.); Briscoe v.

Jefferson Davis Parish Police Jury (unreported, C.A. No. 17, 392 W.D. La., April 5, 1972, Edwin F. Hunter, Jr., J.). Moreover, the Fifth Circuit in Keller v. Gilliam, 454 F.2d 55 (1972), reversed the District Court holding in Mississippi and held that where supervisors had been elected under an at-large plan, their terms should be shortened to no more than six months, and special elections conducted under a single-member district plan.

54. The Registrar of Voters here testified it would be possible for him to arrange the registration rolls so that an election could be held under defendants' five single-member district plan at the same time that other Parish elections are to be conducted this summer (tentative first primary date August 17th).

55. Plaintiffs have moved for attorney's fees on the bad faith, common benefit, and private attorney general therories. Plaintiffs' counsel testified that up to and including the first day of trial, April 24, 1974, he expended 128.5 hours in the necessary preparation of plaintiffs' case, and itemized the time expended. Beyond this, ont the second day of trial, Plaintiffs' counsel expended a minimum of five hours in trial and preparation, and at least an additional five hours in preparation of plaintiffs' suggested Findings of Fact and Conclusions of Law, directed by this Court. This totals 138.5 hours in legal work expended by plaintiffs' counsel. Plaintiffs also have moved for certain trial expenses or costs, as follows: $100.00 as the charge by the Registrar of Voters for preparation of a precinct map and registration data; $250.00 for the expert witness fee of Professor Richard L. Engstrom (who was required to be present at trial for two days); and $65.28 for round-trip plane fare of the expert witness from New Orleans to Shreveport and return.

56. Earlier, the American rule was that attorney's fees are not favored in the absence of a specific statutory provision. See, for example, Simmons v. Friday, 190 F.2d 849, 851

(8th Cir., 1951). This former restrictive rule is inconsistent with the position taken by most common and civil law jurisdictions, 1/ and effectively has been eroded more recently in the United States. For a number of years, juridical writers and commentators have criticized the restrictive American rule, arguing that attorney's fees should be included as costs within the equitable discretion of the District Court. 2/

57. In recent years, federal courts also have criticized as well as seriously eroded the traditional American rule and have awarded attorney's fees in *pro bono publico* litigation in a variety of substantive areas under several theories in the absence of statutory authorization.

1/ In English law, the rule in equity varied from the rule at law. At equity, the Lord Chancellor had inherent power and unfettered discretion in awarding fees. Sprague v. Ticonic National Bank, 307 U.S. 161, 166, 59 S. Ct. 777, 83 L. Ed. 1184 (1939). At law, however, awards of fees were statutory, dating at least from the Statute of Marlborough in 1267 (52 Hen. III, c. 6), and the Statute of Gloucester in 1275 (6 Edw. I, c. 1). See too, Pollock & Maitland History of English Law, 597 (2d ed., 1898) and Goodhart, Costs, 38 Yale L.J. 849 (1929). For a summary of general rules prevailing in other jurisdictions, see Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966).

2/ See., *e.g.*, Kuenzel, The Attorneys' Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); Stoebuck Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); note, Attorney's Fees: Where Shall the Ultimate Burden lie?, 20 Vand. L. Rev. 1216 (1967); McLaughlin, The Recovery of Attorney's Fees; A New Method of Financing Legal Services, 40 Fordham L. Rev. 761 (1972); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); note, The Allocation of Attorney's Fees after Mills v. Electric AutoLite Co., 38 U. Chi. L. Rev. 316 (1971); Allowance of Attorney's Fees in Civil Rights Actions, 7 Colum. J. of Law & Social Probs., 381 (1971).

58. The federal courts also have given liberal interpretations to statutes which authorize the "discretionary" award of atttorney's fees. For example, Title II of the Civil Rights Act of 1964, although only providing for fees in the "discretion" of the Court, has been interpreted to call for an award of fees as a matter of course "unless special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968). An identical construction was given to the "discretionary" fee provision of Section 718 of the Emergency School Aid Act of 1972, 86 Stat. 235, by the United States Supreme Court in Northcross v. Board of Education, 412 U.S. 427, 93 S. Ct. 2201, 37 L. Ed. 2d 48 (1973).

[16] 59. In the absence of statutes, American federal courts always have had equitable powers to award attorney's fees, Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S. Ct. 777, 83 L. Ed. 1184 (1939), but until recent years have used the power rarely. Attorney's fees historically have been regarded as an appropriate punishment for those who litigate in bad faith, by using dilatory tactics or raising specious defenses. Aside from these situations, however, the most frequent awards of attorney's fees prior to the 1960's was in those cases where there was a recovery for the benefit of a class. In these cases, fees were assessed from a real or fictitious "fund" created by the attorney's successful prosecution. 3/

3/ Although the "common fund" theory understandably arose most often in commercial cases, it was also found appropriate in consumer actions. See, *e.g.*, Washington Gas Light Co. v. Baker, 90 U.S. App. D.C. 98, 195 F. 2d 29 (1951) and Bebchick v. Public Utilities Comm'n, 115 U.S. App. D.C. 216, 318 F. 2d 187 (1963).

60. From 1939, when the Supreme Court in *Sprague, supra*, affirmed federal courts' equity power to award attorney's fees, until 1967, when the Supreme Court decided Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967), the federal courts increasingly awarded attorney's fees in commercial suits. During the same period an increasing number of federal statutes were enacted, either authorizing a discretionary award of fees, or making such an award mandatory. 4/ The Supreme Court's *Fleischmann* decision temporarily halted the erosion of the traditional rule, as lower courts read the decision to mean that fees should not be awarded in the absence of specific statutory authorization.

61. In 1970, however, the Supreme Court once again considered the issue of attorney's fees in Mills v. Electric Auto-Lite

4/ See, *e.g.*, Fair Labor Standards Act, § 16(b), 29 U.S.C. § 216(b), June 25, 1938, 52 Stat. 1069; Copyright Act, 17 U.S.C. § 116, July 30, 1947, 61 Stat. 652; Labor-Management Reporting and Disclosure Act, § 501(b), September 14, 1959, 73 Stat. 535; Patent Infringement Suits, 35 U.S.C. § 285, July 19, 1952, 66 Stat. 813; Servicemen's Readjustment Act, 38 U.S.C. § 1822(b), September 2, 1958, 72 Stat. 1214; Packers and Stockyards Act, § 309(f), 7 U.S.C. § 210(f), August 15, 1921, 42 Stat. 165; Perishable Agricultural Commodities Act, § 7(b), 7 U.S.C. § 499g(b), June 10, 1930, 46 Stat. 534; Clayton Act, § 4, 15 U.S.C. § 15, October 15, 1914, 38 Stat. 731; Securities Act of 1933, § 11(e), 15 U.S.C. § 77k (e), May 27, 1933, 48 Stat. 82; Trust Indenture Act, § 323(a), 15 U.S.C. § 77www(a), August 3, 1939, 53 Stat. 1176; Securities Exchange Act of 1934, § § 9(e), 18(a), 15 U.S.C. § § 78i(e), 78r(a), June 6, 1934, 48 Stat. 889; Civil Rights Act of 1964, Title II, 42 U.S.C. § 2000a-3(b), Civil Rights Act, 1964, § 204; Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k), Civil Rights Act, 1964, § 706; Fair Housing Act of 1968, § 812, 42 U.S.C. § 3612(c), April 11, 1968, 82 Stat. 88; Railway Labor Act, § 3, 45 U.S.C. § 153(b), May 20, 1926, 44 Stat. 578; Communications Act of 1934, § 206, 47 U.S.C. § 206, June 19, 1934, 48 Stat. 1072; and Interstate Commerce Act § 16, 49 U.S.C. § 16(2), February 4, 1887, 24 Stat. 384.

Co., 396 U.S. 375, 90 S. Ct 616, 24 L. Ed. 2d 593 (1970). In *Mills*, the Court ordered fees paid to plaintiffs who had established that the corporation they were suing had issued misleading proxy statements, in violation of the Securities Exchange Act. The Court based its decision on a theory of "corporate therapeutics" because the litigation benefited the corporation being sued (by securing compliance with the law, even though the benefit might never be financial),–the corporation, and not the plaintiffs bringing suit, should bear the expense of obtaining the benefit.

62. During the same period, equitable rules for awarding attorney's fees in *pro bono publico* litigation were also liberalized, often taking a cue from commercial law. In early school desegregation cases, attorney's fees were awarded successful plaintiffs only in the presence of the most egregious forms of bad faith, and the benefit theory almost never was applied.5/

63. The largest impetus in awards of attorney's fees in *pro bono publico* litigation came after the enactment of the Civil Rights Act in 1964, and the decisions in *Newman*, *supra*, and *Mills*, *supra*, when the lower courts began to apply a form of the benefit theory in *pro bono* cases: by suing to enjoin racial discrimination, plaintiffs of small means were enforcing a strong national policy benefiting the entire nation. They were, in effect, acting as "private attorneys general" who rarely recovered damages in their suits. Courts realized that " . . . [i]f successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman*, *supra*, at 402.

5/ However, see Rolax v. Atlantic Coast Line R.R., 186 F. 2d 473 (4th Cir., 1951), for an early example of the application of the benefit theory.

64. Understandably, the "private attorney general" rationale increasingly has been applied to statutes which did not provide for attorney's fees, but which do embody strong national policy to vindicate personal rights–most specifically, the Civil Rights Acts passed in the wake of the Civil War: 42 U.S.C. §§ 1981, 1982, and 1983. Courts have recognized that " . . . in fashioning an effective remedy for the rights declared by Congress one hundred years ago, courts should look not only to the policy of the enacting Congress but also to the policy embodied in closely related legislation," Lee v. Southern Home Sites, 444 F. 2d 143 (5th Cir., 1971), and have held that fees should be awarded not only in cases arising under recent statutes in which Congress has spoken, but also under older, related statutes in which Congress left the creation of remedies to the courts. The three-judge court in Alabama, in awarding attorney's fees under § 1983, summarized the rule: "if, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. . . . Indeed, under such circumstances, the award loses much of its discretionary character and becomes part of the effective remedy a court should fashion to encourage public-minded suits . . . and to carry out congressional policy." Sims v. Amos, 340 F. Supp. 691 (M.D. Ala., 1972), aff'd sub nom. Amos v. Sims, 409 U.S. 942, 93 S. Ct. 290, 34 L. Ed. 2d 215 (1972).

65. The flux of the law thus has been one of shifting the emphasis from purpose (bad faith) to effect (vindication of national policies), or from punishment to therapeutics. The appellate courts also have been increasingly willing to review a trial court's determination regarding attorney's fees. They have ruled that district judges abuse their discretion in denying attorney's fees in *pro bono publico* cases;6/ have ruled that district

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6/ *E.g.*, Bell v. School Board of Powhatan County, 321 F. 2d 494 (4th Cir., 1963) (en banc); Nesbit v. Statesville City Board of Education, 418 F. 2d 1040 (4th Cir. 1969) (en banc); Knight v. Auciello, 453 F. 2d 852 (1st Cir., 1972).

judges have erred by awarding too small an attorney's fee. 7/ and have even awarded attorney's fees themselves for prosecuting an appeal. 8/

66. Judge Robert F. Peckham, in La Raza Unida v. Volpe, 57 F.R.D. 94, 96 (N.D. Cal., 1972), concisely stated that the present status of the law is that an award of attorney's fees is appropriate in three types of situations: 1) the "obdurate behavior" situation, where the courts use their equitable powers to impose costs on defendants who have acted in bad faith; 2) the "common benefit" situation, where courts use their equitable power to ensure that the beneficiaries of litigation are the ones who share the expense; and 3) the "private attorney general" situation,where the courts use their power when necessary and appropriate to assure the effectuation of strong legislative policies.

67. In redistricting cases, particularly where there have been issues of racial discrimination, federal courts have awarded attorney's fees almost as a matter of course, because such actions clearly benefit the public as a whole, "regardless of defendants' good or bad faith." Sims v. Amos, *supra*.

68. In *Sims, supra*, the Alabama reapportionment case, the Court was most explicit, stating that while defendants' adherence to "obviously unacceptable plans" amounted to bad faith:

"Nevertheless, a finding of bad faith is not always a prerequisite to the taxing of attorneys' fees against defendants,

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7/ *E.g.*, Griffin v. County School Board of Prince Edward County, Virginia, 363 F. 2d 206 (4th Cir., 1966) (en banc), cert. denied, 385 U.S. 960, 87 S. Ct. 395, 17 L. Ed. 2d 305 (1966).

8/ *E.g.*, Clark v. Board of Education of the Little Rock School District, 449 F. 2d 493 (8th Cir., 1971) (en banc).

and in this case, despite the availability of that ground, the Court has decided to base its award on far broader considerations of equity.

"In instituting the case sub judice, plaintiffs have served in the capacity of 'private attorneys general' seeking to enforce the rights of the class they represent. . . . If, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong Congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. . . . Indeed, under such circumstances, the award loses much of its discretionary character and becomes part of the effective remedy a court should fashion to encourage public-minded suits, . . . and to carry out congressional policy.

* * * * * * * * * * * * * * * * *

". . . The benefit accruing to plaintiffs' class from the prosecution of this suit cannot be over-emphasized. No other right is more basic to the integrity of our democratic society than is the right plaintiffs assert here to free and equal suffrage. In addition, congressional policy strongly favors the vindication of federal rights violated under color of state law, 42 U.S.C. § 1983, and, more specifically, the protection of the right to a nondiscriminatory franchise."

69. Using this approach federal courts in Mississippi consistently have awarded fees to plaintiffs in cases involving voting rights. Carpenter v. Toller (No. GC 718–K.N., Miss., Keady, J., May 26, 1971); Kitching v. Bobo (No. D.C. 7082–K, N.D. Miss., May 24, 1971, Keady, J.); Williams v. Hughes (No. D.C. 7076–S, N.D. Miss., Smith, J., February 19, 1971); Sigales v. Cumbest, (No. 3239, S.D. Miss., Russell, J., February 18, 1970); Scott v. Burkes (No. 4782, S.D. Miss., Nixon, J., April 29, 1971); Dyer v. Love, 307 F. Supp. 974, 986 (N.D. Miss., 1969); and Martinolich v. Dean, 256 F. Supp. 612 (S.D. Miss., 1966).

70. Similarly in Louisiana in cases involving redistricting, the voting rights of blacks and Section 5 of the Voting Rights Act, federal courts have awarded plaintiff's fees on the "therapeutic" or "private attorney general" theories. Briscoe, et al. v. Jefferson Davis Parish Police Jury (C.A. No. 17,392 U.S.D.C., W.D. La., September 2, 1972, Hunter, J.); Claiborne Parish Civic Leauge, et al. v. The Claiborne Parish School Board, et al. (C.A. No. 18,094, U.S.D.C., W.D. La., August 28 and September 18, 1972, Dawkins, J.); Clark v. DeSoto Parish School Board (C.A. No. 17,266, U.S.D.C., W.D. La., June 14, 1972, Dawkins, J.); Hargrove v. Caddo Parish School Board (C.A. No. 17,630, U.S.D.C., W.D. La. Dawkins, J.); Brach v. Franklin Parish School Board (C.A. No. 17,469, Dawkins, J.); London v. East Feliciana Parish Police Jury, 347 F. Supp. 132 (E.D. La., 1972, West, J.), reversed and remanded on other grounds 476 F. 2d 637 (5th Cir., 1973).

71. In two recent cases, the United States Court of Appeals for the Fifth Circuit has upheld district court awards of attorney's fees under the common benefit and "private attorney general" theories. In Thompson v. Richland Parish Police Jury, 478 F. 2d 1401 (5th Cir., 1973), rehearing denied 481 F. 2d 1404 (1973), the Fifth Circuit affirmed summarily, pursuant to Rule 21, an award of attorney's fees by this Court's order of August 31, 1972, in a similar redistricting case. Even more recently, on May 13, 1974, the Fifth Circuit in Cornist et al. v. Richland Parish School Board et al., 495 F. 2d 189 (5th Cir.) upheld an award of attorney's fees by this Court in a case of a single wrongfully dismissed teacher. The Fifth Circuit in that case upheld all of the grounds cited by the District Court for its award of attorney's fees, including an explicit affirmance that attorney's fees were appropriate because plaintiff's attorney " . . . had acted as 'private attorney general' in securing the rights of plaintiffs, which benefited not only them, but all the black teachers in the Parish, as well as the school system as a whole, by virtue of the system's being brought into

compliance with federal law and Congressional policy." In support of this proposition, the Fifth Circuit cited McLaurin v. Columbia Municipal Separate School District, 478 F. 2d 348 (5th Cir., 1973); Horton v. Lawrence County Board of Education, 449 F. 2d 793 (5th Cir., 1971), and Lee v. Southern Home Sites, *supra*. Thus, with these cases, the Fifth Circuit explicitly has sanctioned and found precedent for awards of attorney's fees under the "private attorney general" theory and the common benefit theory.

[17] 72. Here it is clear that plaintiffs have acted as "private attorneys general" in securing the most important right to an unabridged vote upon which our whole system of government is based, and which is supported by the strongest Congressional and constitutional policy.

73. Clearly, also, the benefits here are therapeutic to the body politic of Ferriday as a whole, and, by correcting the constitutionally infirm method of selecting Aldermen, plaintiffs have secured a benefit which goes to every citizen of the Town of Ferriday.

74. While the Board of Aldermen's steadfast adherence to a constitutionally unacceptable plan during the course of this litigation would amount to bad faith, and despite the availability of that ground, we have decided to base our award on the far broader considerations of equity contained in the common benefit and "private attorney general" notions.

75. Similarly, where courts have found an award of attorney's fees appropriate, they also have found an award of litigation expenses such as expert witness fees, transportation for expert witnesses, and other special services. For example, in Sims v. Amos, *supra*, the Court awarded plaintiffs' expert witness, Dr. Valinsky, an expert witness fee and expenses taxed as Clerk's Costs in the amount of $3,235.55.

76. Under the common benefit theory and private attorney general theory, courts have applied the reasoning of *Sprague, supra*, and its progeny, directly to expert witness fees and other extraordinary costs of litigation. In Banks v. Chicago Mill and Lumber Co., 106 F. Supp. 234 (E.D. Ark., 1950), the district court referred to Rule 54(d) of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1920, stating:

> "These provisions vest the question of costs in a civil case in the sound judicial discretion of the Court, and in an equity case, such as this, the Court is not limited to the so-called 'statutory costs', but in a proper case may make additional allowances of costs in accordance with [the] sound equitable principles. [*Sprague, supra*."

The Court concluded: "I have the power to allow as costs the compensation paid to expert witnesses for their preparation and testimony . . . ." (*Id.*, at pp. 236-237.)

77. Similarly, in Andresen v. Clear Ridge Aviation, 9 F.R.D. 50 (D. Neb., 1949), the Court considered the taxability of several items of expense, including expert witness fees. It held (at p. 52):

> "While no statute identifies those expenditures as taxable costs, that circumstance is not alone decisive upon the issue of their allowability. This action for injunctive relief is equitable in its nature. The power of the court in awarding costs in it is, therefore, not circumscribed as narrowly as is the judicial authority respecting costs in an action for the recovery of a judgment for money only."

See also, Swann Carburetor Co. v. Chrysler Corp., 55 F. Supp. 794 (E.D. Mich., 1944), modified in other respects, 149 F. 2d 476 (6th Cir., 1945).

78. In La Raza Unida v. Volpe, *supra*, one of the leading cases upholding the "private attorney general" theory, the Court held (at p. 102):

> "The affidavits of the expert witnesses were quite helpful to the Court, and were a crucial part of plaintiffs' presentation. For the reasons stated above in granting attorneys' fees, plaintiffs' motion to award expert witness fees is also granted."

See also, Swann v. Charlotte-Mecklenburg Board of Education, 431 F. 2d 138, 148 (4th Cir., 1970), modified in other respects, 401 U.S. 805 (1971) (awarding expert fees in a school desegregation case); Jackson v. School Board of City of Lynchburg, (No. 534, W.D. Va., April 28, 1970) (expert consultant fees in a desegregation case); Jones v. Wittenberg, 330 F. Supp. 707, 722 (N.D. Ohio, 1971) (expert witness fees in prison case); and Wright v. McMann, 321 F. Supp. 127, 144 (N.D.N.Y., 1970) (fees granted in decree of August 19, 1970) (expert witness fees in prisoner's rights case).

79. In a most recent case decided by Judge Rubin (E.D. La.) under Title VII of the Civil Rights Act, Barth et al. v. Bayou Candy Co., Inc., (C.A. No. 72-753, Opinion and Order of May 1, 1974), the Court allowed as costs items such as photocopying, postage, and long distance phone calls. The Court also allowed a photographer's fee at $250.00 per day.

80. Accordingly, we find that an award should be made of an expert witness fee for Professor Richard L. Engstrom in the amount of $250.00 and an additional $65.28 for his air fare, for a total of $315.28, to be paid by defendant Board of Aldermen for the Town of Ferriday into the registry of the Court, and the Clerk shall thereafter issue a check in like amount to Professor Engstrom. Similarly, the Registrar of Voters, J. P. House's fee for developing the precinct and registration data also shall be

allowed as a legitimate plaintiffs' expense, and defendant Board of Aldermen shall pay the amount of $100.00 into the registry of the Court, and the Clerk shall thereafter issue to Mr. House a check in the amount of $100.00.

81. We further conclude that attorney's fees should be allowed to plaintiffs' attorney under the circumstances of this case for the reasons indicated.

[18] 82. As to the amount of the fees, the recent decision of the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F. 2d 714 (5th Cir., 1974), makes clear those factors to be considered in determining the amount of fees to be allowed. Once it has been determined that fees are to be allowed, the standard for determining the amount of fees is the same whether the authorization of the award is contained in a statute or is within the sound equitable discretion of the Court.

83. Counsel for plaintiffs submitted an itemized list of the time spent in preparation and trial of the case, which as indicated earlier, totalled 138.5 hours. Plaintiffs' counsel also made himself available for any cross-examination by opposing counsel. Defendants did not question that the number of hours expended was reasonable.

[19] 84. Some of the considerations suggested in *Johnson, supra*, here applicable, include the results obtained at trial, and the insurance of adequate remuneration to those attorneys representing the prevailing party. As Judge Rubin stated in *Barth, supra*, in order to accomplish Congressional policy " . . . able representation of plaintiffs should be encouraged. And one way in which such representation may be encouraged is to ensure that successful litigation results in adequate remuneration to those attorneys representing the plaintiffs, the prevailing party."

85. The customary fee for attorneys in Louisiana begins at $35.00 per hour. We agree with Judge Rubin when he said in *Barth, supra*, that " . . . as an attorney gains experience, or as his or her expertise increases in a particular area of law, counsel's fees increase substantially." This is understandable in that an attorney's expertise in a given area allows him to be more efficient and to perform work in less time than would less experienced counsel. Considering the length of this litigation, the complexity of the factual issues, and the proof required of plaintiffs, the necessity for expert testimony, and all other factors, 138.5 hours appears to the Court as an extremely efficient use of time. Moreover, from our own observation of Mr. Halpin's performance throughout this litigation and at trial, it is clear that a less experienced attorney would have not only spent more of his own time, but would have required more time of the Court in conducting the trial, various pretrial matters, and the like. Mr. Halpin's experience in redistricting and voting rights cases is well known to the Court by virtue of his appearance representing plaintiffs in over twenty voting and redistricting cases before this Court. He also has been counsel in other such cases before other federal district courts in the State, as well as in the United States Court of Appeals for the Fifth Circuit, and before the United States Supreme Court.

[20] 86. Accordingly, we find that an award to plaintiffs' counsel in the amount of $50.00 per hour for the 138.5 hours expended by him is appropriate, and any less would be unfair, or a total of $6,925.00.

WALLACE v. HOUSE

George WALLACE, Sr., et al.,
Plaintiffs-Appellees,

v.

J. P. HOUSE, Individually and as Registrar of Voters of Concordia Parish, Louisiana, et al., Defendants, L.W. Davis, etc., et al., Defendants-Appellants.

No. 74-2654.
United States Court of Appeals,
Fifth Circuit.
July 7, 1975.

Black citizens brought class action civil rights suit claiming deprivation or rights arising out of at-large election of town aldermen. The United States District Court for the Western District of Louisiana, 377 F.Supp. 1192, Benjamin C.Dawkins, Jr., J., entered judgment that the at-large scheme of electing aldermen in town was unconstitutional and adopted the second alternative plan submitted by the board which provided for five single-member districts. Certain of the defendants appealed. The Court of Appeals, Goldberg, Circuit Judge, held that the scheme of at-large elections for town aldermen was unconstitutional; that both alternative apportionment plans submitted by the board were constitutional; and that, in view of the constitutionality of both plans, the district court should have adopted the "mixed" plan, whereby four aldermen were elected from single-member districts and one alderman elected at-large, which was preferred by the board.

Affirmed in part; reversed in part; vacated in part and remanded.

Grooms, District Judge, concurred and filed opinion.

Roney, Circuit Judge, specially concurred and filed opinion.

1. Constitutional Law Key 225(1) Elections Key 12

Where town's at-large aldermanic election scheme operated to dilute the votes of the black citizens of the town, who constituted a near majority, the scheme violated the black citizens' rights under the Fourteenth and Fifteenth Amendments. U.S.C.A.Const. Amends. 14, 15.

2. Constitutional Law Key 225(1)

Aggrieved voters may establish the existence of an unconstitutional districting scheme either by showing a racially motivated gerrymander or a plan drawn along racial lines, or by demonstrating that, designedly or otherwise, the particular scheme operates to minimize or cancel out the voting strength of minority elements of the voting population. U.S.C.A.Const. Amends. 14, 15.

3. Municipal Corporations Key 80

Board of aldermen's proposed alternative election plans which created maximum population percentage variations for single-member aldermanic districts of 6.7% for the first plan and 4.3% for the second and average percentage variations of ± 2.11% and ±1.02% respectively, were within the permissible zone of district population variances. U.S.C.A.Const. Amends. 14, 15.

4. Municipal Corporations Key 80

Fact that a mayor of a Louisiana municipality presides at meetings of board of aldermen and casts the deciding vote in case of an equal division among the aldermen and the probability that the mayor of Ferriday would primarily represent the interests of the white voting majority did not represent significant factor in determination of validity of proposed districting plans for town aldermanic elections. U.S.C.A. Const. Amends. 14, 15.

5. States Key 27(4)

No racial or political group has a constitutional right to be represented in the legislature in proportion to its numbers and no such group is constitutionally entitled to an apportionment structure designed to maximize its political advantages. U.S.C.A. Const. Amends. 14, 15.

6. Constitutional Law Key 225(1)

No voter or group of voters has a constitutional right to be included within an electoral district that is especially favorable to the interests of one's own group, or to be excluded from a district that is dominated by some other group. U.S.C.A. Const. Amends. 14, 15.

7. Constitutional Law Key 225(1)

The test of whether an election apportionment scheme is constitutional is not whether the challenged political system has demonstrably adverse effect on the political fortunes of a particular group, but whether the effect is invidiously discriminatory, that is, fundamentally unfair. U.S.C.A.Const. Amends. 14, 15.

8. Constitutional Law Key 225(1)

It is not population but access to the political process that determines whether an interest group enjoys the full vigor of its political rights. U.S.C.A.Const. Amends. 14, 15.

9. Constitutional Law Key 225(1)

Neither possibility for voter confusion nor lack of voter identification with the elected representative is necessary to a finding of "dilution" of minority voting rights by operation of a particular election scheme. U.S.C.A.Const. Amends. 14, 15.

10. Municipal Corporations Key 80

Board of aldermen's proposed alternative apportionment scheme for town aldermanic elections which provided for four single-member districts and one at-large alderman was constitutional. U.S.C.A.Const. Amends. 14, 15; LSA-R.S. 18:351, 18:358, 33:381, 33:404.

11. Constitutional Law Key 225(1)

In order for there to be substantial "dilution," and thus illegal impairment, of minority voting rights, there must be some fundamental unfairness in the electoral system, some denial of fair representation to a particular class. U.S.C.A.Const. Amends. 14, 15.

12. Municipal Corporations Key 80

Louisiana policy since 1898 of favoring at-large aldermen for municipalities is not unreasonable. U.S.C.A.Const. Amends. 14, 15; LSA-R.S. 33:381.

13. Municipal Corporations Key 80

Record established that proposed mixed election plan, in which four aldermen would be elected from single member districts and one alderman elected at-large, would not substantially dilute the voting rights of town's black citizens. U.S.C.A. Const. Amends. 14, 15; LSA-R.S. 33:381.

14. Courts Key 262.4(11)

When there is nothing in a given election scheme that is repugnant to the Constitution, a federal court ought not to substitute a plan which might seem to it only to be more efficient or more just than a plan preferred by the legislature concerned. U.S.C.A.Const. Amends. 14, 15.

15. Constitutional Law Key 225(1)

Even when an existing state or local election scheme is unconstitutional, the legislative body involved ought to be given a reasonable opportunity to devise a constitutional plan, and if the legislature does so, its freedom of choice to devise constitutional substitutes should not be restricted beyond the clear commands of the equal protection clause. U.S.C.A. Const. Amends. 14, 15.

16. Constitutional Law Key 68(3)

Legislatures are better equipped than courts to balance all

of the competing interests involved in legislative apportionment unless the legislature's balancing is so fundamentally unfair as to be unconstitutional. U.S.C.A. Const. Amend. 14.

17. Constitutional Law Key 68(3)

Judicial deference to legislative judgments regarding reapportionment is preferred whether the legislature's plan is operational or merely prospective. U.S.C.A. Const. Amend. 14.

18. Municipal Corporations Key 80

Where both alternative plans submitted by board of aldermen for conducting town aldermanic elections were constitutional, trial court should have adopted the "mixed" plan, whereby four aldermen were elected from single-member districts and one alderman elected at-large, which was the plan preferred by the board. U.S.C.A. Const. Amends. 14, 15; LSA–R.S. 33:381.

19. Constitutional Law Key 215

The Constitution demands not racial representations by ratio but racial equity in the political process. U.S.C.A. Const. Amends. 14, 15.

20. Courts Key 406.9(9)

Award of attorney's fees in black citizens' civil rights action challenging validity of town's aldermanic election scheme was vacated and remanded for consideration in light of the demise of the "private attorney general" rationale and the finding of constitutionality of plan submitted by board of aldermen. 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Western District of Louisiana.

Before GOLDBERG and RONEY, Circuit Judges, and GROOMS, District Judge.

GOLDBERG, Circuit Judge:

This case and a companion case, Perry v. City of Opelousas, 5 Cir. 1975, — F. 2d —, also decided today, form another chapter in the long and difficult struggle to ensure equal voting rights for all citizens. In the proceedings below the district court determined that an all-at-large aldermanic election scheme in a small Louisiana town operated to dilute the votes of the town's black citizens in an unconstitutional fashion. The court also reasoned that the proposal of the Board of Aldermen [the Board] to adopt an election plan with a single at-large member also failed the constitutional test, and so ordered the implementation of an all-single-member selection process. Finally, the district court awarded attorney's fees to the black plaintiffs. 377 F. Supp. 1192. Although the all-at-large election scheme is clearly unconstitutional in the circumstances of this case, we believe that the Board's mixed election plan is not unconstitutional, and that the district court should therefore have deferred to the municipality's legislative judgment and adopted that plan. We affirm in part and reverse in part.

I

Ferriday, Louisiana, is a town of 5,200 people in Concordia Parish, in the northeastern part of the state. As is common in other towns in the area, Ferriday's population is closely divided between blacks and whites: the 1970 census counted about 3,000 blacks (58%) and 2,200 whites (42%). In March, 1972, the voters of Ferriday went to the polls to elect various local officials, including five aldermen, all of whom were to be elected at-large, with no residence requirements. It is fair to say that the town is both highly politicized and racially polarized, so that when the voters were faced with a choice of five white candidates and five black candidates, they apparently opted right down the line for racial solidarity, with whites voting for whites and blacks voting for blacks. Since whites enjoyed a

very slight edge in voter registration over blacks (1,571 (50.5%) to 1,538 (49.5%)), 1/ and since 83% of all the eligible voters turned out on election day, no one should have been surprised to learn that all five white candidated had been elected and all five black candidates defeated.

Even if they were not surprised, the defeated blacks were very unhappy with absolutely no black representation on a Board of Aldermen in a town with a black population majority. The black candidates accordingly filed this 42 U.S.C. § 1983 class action in federal district court on June 13, 1972, charging that Ferriday's all-at-large voting scheme impermissibly diluted the votes of local blacks, and asking for appropriate declaratory and injunctive relief. The court ordered each party to submit alternative redistricting plans, and a bench trial was held on April 24 and 25, 1974, after which the district court concluded that only single-member aldermanic districts would sufficiently guarantee to the black voters the full efficacy of their right of suffrage.

II

[1, 2] There is no question that Ferriday's all-at-large aldermanic election scheme operated to dilute the votes of the black citizens of the town, in violation of the Fourteenth and Fifteenth Amendment rights of that near-majority of the local electorate. As this Court noted in Howard v. Adams County Bd. of Supervisors, 5 Cir. 1972, 453 F. 2d 455, 457, aggrieved

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1/ This discrepancy between population and voting strength is apparently explained by plaintiffs' admission that there are relatively more whites of voting age in Ferriday than there are blacks. As of April 24, 1974, whites continued to maintain a slight majority in voting strength in the town; the total number of registered voters has not changed very much since the completion of the great black voter registration campaigns in 1966.

voters may establish the existence of an unconstitutional districting scheme either by showing a racially motivated gerrymander or a plan drawn along racial lines, or by demonstrating that, designedly or otherwise, the particular scheme operates "to minimize or cancel out" the voting strength of minority elements of the voting population. The second type of cognizable grievance set out in *Howard*—the grievance of plaintiffs here—is generally denominated "dilution." We sketched the parameters of this complex doctrine in Zimmer v. McKeithen, 5 Cir. (en banc) 1973, 485 F. 2d 1297:

> The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, Whitcomb v. Chavis [1971, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363], would require a holding of no dilution. [*Chavis*] would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. . . . [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that existence of past discrimination in general precludes the effective participation [of the complaining group] in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of

> provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's . . . pronouncement in White v. Regester [1973, 412 U.S. 755, 93 S. Ct. 2332, 37 L. Ed. 2d 314], demonstrates, however, that all these factors need not be proved in order to obtain relief.

485 F. 2d at 1305. See also Turner v. McKeithen, 5 Cir. 1973, 490 F. 2d 191, 194.

In this case, plaintiffs presented evidence that, with one recent and fortuitous exception, 2/ no black has ever been elected to municipal office in Ferriday. They showed that, in this thoroughly Democratic town (there are only 85 registered Republicans in the entire parish), no black man or woman has ever been selected to run as the candidate of the Democratic Party. Plaintiffs then chronicled the all-too-familiar story of racial segregation and other racial discrimination in every facet of local public life, including public education and public employment, which discrimination is abating only now. With respect to the distribution and quality of municipal services, the district court found that the streets and sidewalks, sewers and public recreational facilities provided by the Town for its black citizens are clearly inferior to those which it provides for its white citizens. In all these years, the Ferriday Board of

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2/ One of the plaintiffs, Henry Montgomery, won an aldermanic seat in the March, 1968, Democratic primary and served as alderman from 1968 until 1972, when he was defeated in his bid for reelection. Montgomery's 1968 victory was apparently made possible because a popular white opponent withdrew from the race too late to have his name removed from the ballot, and so drained off sufficient white votes to enable Montgomery to win. The district court properly deemed Montgomery's victory a "stroke of luck" which is not likely to be repeated under present conditions.

Aldermen has failed miserably in its responsibilities to its many black constituents.

A large part of the explanation for this inexcusable neglect of black interests is found in the fact that most blacks were not able to vote in Ferriday until fairly recently. Although no federal registrars have ever been sent to Ferriday, there were very few blacks registered to vote until the Voting Rights Act of 1965 was enacted and enforced, and the legacy of intimidation and inferior educational opportunity inhibits many blacks in the exercise of the suffrage even when they are able to vote. Moreover, two features of Louisiana municipal election law coincide with the brief experience of black voting to minimize the impact of black votes upon the outcome of local elections, and therefore, presumably, upon the conduct of local officials. First, Louisiana law provides for a majority rather than a plurality requirement in primary elections. La. Rev. Stat. § 18:358. This seemingly nondiscriminatory provision 3/ requires any candidate who receives a mere plurality in the primary to run in a second primary. Where the voters vote overwhelmingly along racial lines, where a majority of the registered voters are white and where all of the officials are elected at-large, no black candidate is likely to achieve a majority in either the first or the second primary. And here, the primary is *the* election. As if the majority vote requirement were not enough of an impediment to black candidates, Louisiana law poses another severe obstacle to all minority voting interests, racial and otherwise, in the form of the "anti-single shot" or "full slate" requirement.

3/ The majority vote requirement can hardly be said to have been intentionally passed for the purpose of diluting the newly-created black vote, for it has been the law of Louisiana since at least 1898. *See* Louisiana Acts of 1898, No. 136.

La. Rev. Stat. § 18:351. 4/ This provision forces a voter in an at-large election to vote for as many candidates as there are places to be filled, on pain of having his ballot invalidated as to all of the at-large positions for that particular office. Where a minority interest group does not boast a full slate of candidates, the anti-single shot law requires supporters of the minority group to cast ballots for at least some of the group's opponents, thereby rendering the minority's task that much more difficult. 5/ *See generally*, Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523 (1973).

The district court was thus presented with a history of a dearth of black representation in Ferriday municipal government, with clear indications that white aldermen have not been in the habit of rendering effective representation for blacks, and with evidence that the past practice of disenfranchisement of blacks has combined with present provisions of Louisiana's at-large election machinery to make it almost impossible for blacks in Ferriday to compel any alderman to consider their interests. The court decided that at-large government as practiced in Ferriday was not constitutionally representative government insofar as the Town's black citizens were concerned, and that the plaintiffs had made out a prima facie dilution case under the *Zimmer* guidelines. Although the Board attempted to rebut plaintiffs' case at trial by arguing that Ferriday is a friendly small town where everyone knows everyone else and votes for

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4/ The anti-single shot requirement has existed since at least 1922. *See* Louisiana Acts of 1922, No. 97.

5/ In the March, 1972, primary, Ferriday blacks fielded candidates for all five aldermanic posititions, so that if we assume that the voting was done solely on the basis of race, we must also assume that blacks could have voted for blacks for all five seats and thus avoided the perils of the anti-single shot provision in that particular election.

the best man, the Board admitted to this Court at oral argument that plaintiff's dilution case has not been rebutted with respect to the all-at-large aldermanic districting scheme, and that the traditional scheme is unconstitutional. The able trial judge properly found that the all-at-larg plan is irremediably defective, and that he correctly ordered the Board to submit a constitutional plan for his approval. The problem on appeal is whether the district court made the proper choice between the Board's alternative plans.

III

A

[3] The Board submitted two redistricting plans to the district court. 6/ The first [or mixed] plan divided Ferriday into

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6/ Plaintiffs submitted a plan for five single-member districts which did not differ significantly from the Board's all-single-member plan, and plaintiffs do not object to the district court's choice of the latter plan.

The Board's two plans are as follows:

FIRST PLAN

Council District	Total Population	Deviation from Mean Average of 1,310	Proportion of District Population White	Black
A	1,249	−4.6%	99%	1%
B	1,318	+0.1%	7%	93%
C	1,341	+2.1%	0%	100%
D	1,331	+1.7%	64%	36%
At-large	5,239	--	42%	58%

four reasonably compact single-member districts and one at-large district encompassing the entire community; the second created five compact single-member aldermanic districts. The maximum population percentage variations are 6.7% for the first plan and 4.3% for the second, and the average percentage variations are ± 2.11% and ± 1.02%, respectively. Both plans clearly fall within the permissible zone of district population variances allowed in state and local government units by the rule of Mahan v. Howell, 1973, 410 U.S. 315, 93 S. Ct. 979, 35 L. Ed. 2d 320, and plaintiffs do not claim that the single-member districts contained in either plan have been manipulated in an illegal fashion. The discrete problem presented by this case is whether the one at-large district in the Board's first plan ineluctably taints the plan with the unconstitutional aura of dilution.

[4] The practical politics of the controversy are simple. The first plan will create two "safe" white seats and two "safe" black seats, while the critical fifth aldermanic slot will be filled by the votes of all the registered voters of Ferriday. Since the

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6/ (Continued)

SECOND PLAN

Council District	Total Population	Deviation from Mean Average of 1,048	Proportion of District Population White	Black
A	1,072	+3.0%	99%	1%
B	1,045	−0.4%	98%	2%
C	1,035	−1.3%	2%	98%
D	1,049	0.0%	0%	100%
E	1,045	−0.4%	2%	98%

whites have an over-all voting majority, however slim, and since almost every voter in the community seems to vote for persons of his or her own color, the at-large alderman will almost certainly be white and the Board will thus continue to be controlled by the Town's white residents. On the other hand, both parties agree that any fairly-drawn division of the community into five single-member districts will yield two "safe" white seats and three "safe" black seats, so that control of the Board will pass to the black residents of Ferriday if the second plan is adopted. 7/

Plaintiffs argue that the first plan—the plan the Board prefers—is an illegal "institutional" gerrymander, for the use of the one at-large district enables the whites to retain the political control that they would surely lose under an all-single-member plan. Defendants rejoin that the all-single-member plan would merely yield the opposite racial and political result, and that the adoption of the second plan would constitute reverse discrimination. Although there was no direct evidence that the Board drew up the first plan with the specific intention of disenfranchising its black constituents, the district court could not help but conclude that the aldermen knew what the different results of the two plans would be. The court then decided that the Board's strong preference for the first plan with

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7/ We note that the mayor of a Louisiana municipality presides at meetings of the board of aldermen and casts the deciding vote in case of an equal division among the aldermen. La. Rev. Stat. 33:404. Since the mayor is elected at-large, La. Rev. Stat. 33:381, his limited voting power must be considered to some extent in deciding whether a particular aldermanic election scheme, unconstitutionally abridges the voting rights of minority voters. In this case, it is probable that the mayor of Ferriday will primarily represent the interests of the white voting majority, but plaintiffs do no argue and we cannot conclude that this additional factor is a significant one in the circumstances of this case.

its one at-large district was "merely a slightly more sophisticated device . . . for accomplishing what obviously would be impermissible if done by manipulation of district lines," 377 F. Supp. at 1200—that is, the dilution of the black vote—so that the one at-large district operated to minimize and cancel out the local black vote for the same reasons as the traditional all-at-large system. The district court therefore rejected the Board's mixed plan and adopted its all-single-member plan. Unfortunately, the learned trial judge was forced to apply some very broad generalizations of voting rights law to a particularized problem of first impression, and we believe that he misapprehended some of the legal problems upon which his conclusions were based.

B

The Supreme Court first set a normative standard for the "one man, one vote" doctrine in Reynolds v. Sims, 1964, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506, when it held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." 377 U.S. at 568, 84 S. Ct. at 1385, 12 L. Ed. 2d at 531. In *Reynolds*, the Court was faced with the then-common situation wherein, as a result of legislative malapportionment, one district (usually an urban one) might contain two, five or ten times as many people as another district (usually a rural one), and yet have only the same number of representatives in the legislature. For the purposes of state government, it was as if each rural voter had two, five or ten times as many votes as each urban voter, and such "overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there." 377 U.S. at 563, 84 S. Ct. at 1382, 12 L. Ed. 2d at 528. The resulting discrimination against the underrepresented voters was obvious, for such malapportionment allowed most legislators to ignore

the problems and interests of a substantial portion, or even of a majority, of the state's population and yet run no risk of defeat at the polls. 8/

Since *Reynolds*, the Supreme Court and the other federal courts have faced various problems connected with the "one man, one vote" principle, 9/ but nowhere have the courts faced such difficulty in application of the rule as when asked to determine the constitutionality of electoral systems utilizing multi-member or at-large districts. Multi-member districts are particularly troublesome because they may satisfy the "one man, one vote" standard where raw population data are concerned and yet effectively negate the voting strength of large numbers of voters. Of course, since there are winners and losers in every election, it might be said that losers' votes are always "lost," and there is clearly nothing unconstitutional about such a result in itself. But multi-member districts have a peculiar capacity to deny representation to racial or political minority groups which could or would obtain such representation if the polity in which they live were divided instead into single-member constituencies. Among the defects generally assigned to multi-member districts are: first, their tendency—by virtue of their winner-take-all aspect—to submerge minorities and to over-represent the majority party or group as compared with that party or group's polity-wide electoral position; second, a general preference for legislatures which reflect community

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8/ The rule of *Reynolds* was subsequently applied to local governments in Avery v. Midland County, 1968, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45, with certain exceptions not relevant here. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 1973, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659.

9/ For an analysis of the Supreme Court's "one man, one vote" cases, *see* Casper, Apportionment and the Right to Vote: Standards of Judicial Scrutiny, 1973 Sup. Ct. Rev. 1.

interests as closely as possible; third, the fact that since at-large members necessarily represent their multi-member district as a whole, identifiable constituencies within the district have no one member specifically charged with representing them; and fourth, the fact that ballots in at-large elections may be bulky and confusing to voters. *See., e.g.*, Chapman v. Meier, 1975, — U.S. —, 95 S. Ct. 751, 760, 42 L. Ed. 2d 766, 778; Whitcomb v. Chavis, *supra*, 403 U.S. at 158-59, 91 S. Ct. at 1877, 29 L. Ed. 2d at 384–85; Carpeneti, Legislative Apportionment: Multi-Member Districts and Fair Representation, 120 U. Pa. L. Rev. 666 (1972); Banshaf, Multi-Member Electoral Districts–Do They Violate the "One Man, One Vote" Principle, 75 Yale L.J. 1309 (1966); Note, Ghetto Voting and At-Large Elections: A Subtle Infringement Upon Minority Rights, 58 Geo. L.J. 989 (1970). The question is at what point these undesirable effects coalesce so as to deny legislative representation to minorities on a scale of constitutional dimensions.

For the first few years after *Reynolds*, the Supreme Court declined to analyze the problems presented by multi-member districts, aside from noting in Fortson v. Dorsey, 1965, 379 U.S. 433, 85 S. Ct. 498, 13 L. Ed. 2d 401, Burns v. Richardson, 1966, 384 U.S. 73, 86 S. Ct. 1286, 16 L. Ed. 2d 376, and Kilgarlin v. Hill, 1967, 386 U.S. 120, 87 S. Ct. 820, 17 L. Ed. 2d 771, that such schemes were not unconstitutional *per se*, while cautioning that particular uses of the device might not withstand inspection. 10/ In Connor v. Johnson, 1971, 402 U.S.

10/ The Court implicitly approved the use of multi-member districts in *Reynolds* itself, 377 U.S. at 577, 84 S. Ct. at 1389, 12 L. Ed. 2d at 536, but on the same day, in Lucas v. Colorado General Assembly, 377 U.S. 713, 84 S. Ct. 1459, 12 L. Ed. 2d 632, the Court catalogued various defects inherent in such devices.

690, 91 S. Ct. 1760, 29 L. Ed. 2d 268, however, the Court decided that multi-member districts are sufficiently less desirable than single-member districts so that when federal courts are forced to fashion apportionment plans, they ought as a general rule to prefer single-member districts to multi-member solutions.

Then, in Whitcomb v. Chavis, 1971, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363, the Court was asked to decide the constitutionality of a multi-member plan for the election of state legislators in Marion County, Indiana. The plan provided that all the voters of the County would vote for all eight of the County's state senators and all fifteen of its assemblymen, and since a majority of the County's voters were in the habit of voting for white, Republican candidates, the result was that black and Democratic legislators were relatively rare in the Marion County delegation. A group of black plaintiffs attacked the scheme, on the theory that it produced fewer black legislators than there were black residents in the County. The district court held that the multi-member districts illegally minimized and cancelled out black voting strength. On appeal, the Supreme Court found the multi-member plan to be constitutional and reversed the judgment of the district court.

The Court began its discussion by stressing that multi-member districts may in some cases dilute minority voting rights in an impermissible manner, particularly if the districts are large or if the election scheme lacks residence requirements (so that all of a district's representatives might live in one area of the district), thus enhancing the prospects of majoritarian monopoly of representation. That said, the Court noted that challengers of election schemes have the burden of demonstrating the unconstitutionality thereof, and concluded that the *Chavis* plaintiffs had failed to discharge their burden of proof of dilution. The plaintiffs and the district court had assumed that black citizens could be adequately represented

only by black officials and had reasoned that a comparison of population figures and legislative strength made it clear that the multimember plan produced fewer black legislators than the black population deserved, that one black person's vote was in this way less effective than one white person's vote, and that this inequality of voting power was the very sort of abridgment of the right of suffrage forbidden by *Reynolds* and its progeny. The Supreme Court held, however, that the disproportion between black residents and black legislators did not prove invidious discrimination absent evidence and findings that blacks in Marion County

> had less opportunity than did other [citizens] to participate in the political processes and to elect legislators of their choice. We have discovered nothing in the record . . . indicating that [blacks] were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence . . . show . . . that [blacks] were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

403 U.S. at 149–50, 91 S. Ct. at 1872, 29 L. Ed. 2d at 379–80. On the contrary, blacks were regularly slated as candidates and were elected with some frequency. Mort importantly, the evidence showed that candidates and elected representatives, white as well as black, "avowed a substantial commitment to the substantive interests of black people," 403 U.S. at 150 n. 30, 91 S. Ct. at 1873, 29 L. Ed. 2d at 380, and there was no evidence that the legislators charged with representing blacks in the formulation of state policy and programs had ignored the interests of their black constituents. Faced with this record, the Court determined that the major source of plaintiffs' difficulties lay in the fact that most Marion County blacks were Democrats in a Republican area, and that plaintiffs' problems

were not so much in gaining access to the political process as in losing elections.

> The voting power of [blacks] may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls . . . The mere fact that one interest group or another . . has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where . . . there is no indication that this segment of the population is being denied access to the political system.

403 U.S. at 153-56, 91 S.Ct. at 1874, 29 L.Ed.2d at 381-82.

Although *Chavis* did not provide an opportunity for the Supreme Court to demonstrate precisely wherein multi-member plans may suffer from constitutional infirmities, a better occasion soon presented itself in White v. Regester, 1973, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314. In that case, the Court encountered a massive challenge to a redistricting plan for the Texas state legislature. One of the questions presented was whether multi-member districts in the Dallas and San Antonio areas operated to dilute the votes of blacks and Mexican-Americans in those localities. The evidence presented in *Regester* was of a very different sort than that offered in *Chavis*. In *Regester*, the district court found that Texas blacks and browns had experienced a long and recent history of pervasive discrimination with respect to voter registration and voting. The court found further that Dallas blacks were never slated as candidates by the political organizations in that city, that white candidates had often injected racial issues into campaigns, that blacks in Dallas were "generally not permitted to enter into the political process in a reliable and meaningful manner," 412 U.S. at 767, 93 S.Ct. at 2340, 37 L.Ed.2d at 325, and that Mexican-Americans in San Antonio suffered similar political disabilities. The multi-member district device was intimately related to the perpetuation of this effective disenfranchisement

of minority voters, for the plan allowed the white majorities in Dallas and San Antonio totally to negate black and brown voting strength, and the device also allowed the state legislators who were elected by the white majority totally to ignore the interests of their minority constituents. Faced with an election scheme which did not then and might not ever provide any voice—white, black or brown—in the legislature for Dallas blacks and San Antonio Mexican-Americans, the district court concluded that in this case the multi-member districts could not be tolerated, for they operated to exclude substantial racial minorities not only from political victory but even from political consideration, and that such a result was inimical to those constitutional notions of fair political representation that are bound up in the concept of "the right to vote."

The Supreme Court affirmed the judgment of the district court, and so held for the first time that a multi-member plan divised by a legislature was unconstitutional. The Court rejected the notion proposed by plaintiffs that "every racial or political group has a constitutional right to be represented in the state legislature," 412 U.S. at 769, 93 S.Ct. at 2341, 37 L.Ed.2d at 326, but agreed with the district court that the totality of circumstances in *Regester* supported a finding of an illegal dilution of the voting rights of minority citizens. The Court repeated its stricture, first enunciated in *Chavis*, that in order to sustain claims that the votes of a minority group have been minimized or cancelled out:

> it is not enough that the . . . group . . . has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 765-66, 93 S.Ct. at 2339, 37 L.Ed.2d at 324.

The right to vote considered in *Chavis* and *Regester* implies that the voter have some reasonably meaningful participation in the choice of candidates and of policies. When the Court condemned political systems where substantial minority groups are effectively excluded from the nomination and election process, it meant that to give a black voter a choice of voting for one of three white candidates who know nothing and care less about his or her interests is to render the vote nugatory and the right meaningless. Of course, such a situation could and does occur in single-member districts where the aggrieved minority may be so small as to command no consideration by elected public officials, although in such a case it might be argued that where a minority is sufficiently small, there can be no substantial dilution of its politically insignificant vote. The particular vice of muti-member districts, however, is their tendency to minimize minority representation even at the lowest political levels in a way that could not occur if single-member districts existed in their stead. Multi-member districts thus pose a problem of degree of fair representation—"fair" not in the sense either of "considerable" or of "proportionate," but rather in a general sense of equity. *Chavis* and *Regester* represent efforts to decide whether a particular political system is fair in this general equitable sense; the two cases make the dilution doctrine and intensely practical, factually-oriented rule against fundamental unfairness. It is for this reason that the Court placed so great a reliance on the records to support or refute plaintiffs' contentions that their respective interest groups were precluded from exercising that amount of political power to which they ought in all fairness to have had access. There was nothing in the record in *Chavis* to indicate that this fundamental political unfairness existed in Marion County, Indiana. Conversely, in *Regester*, the Court made no sweeping statements about the nature of the right to vote and what specific measures must be taken to preserve it intact, but rather concluded that:

> on the record before us, we are not inclined to overturn

[the finding of the district court that the multi-member system in San Antonio effectively negated the votes of local Mexican-Americans], representing as [it does] a blend of history and an intensely local appraisal of the design and impact of the [San Antonio] multimember district in the light of past and present reality, political and otherwise.

412 U.S. at 769-70, 93 S. Ct. at 2341, 37 L. Ed. 2d at 326.

C

[5-7] The federal district courts and courts of appeal have had many opportunities to apply the dilution doctrine to various facts situations and to distill from the Supreme Court's cases additional guidelines for decision. *Chavis* and *Regester* hold explicitly that no racial or political group has a constitutional right to be represented in the legislature in proportion to its numbers, 11/ so it follows that no such group is constitutionally entitled to an apportionment structure designed to maximize its political advantages. Gilbert v. Sterrett, 5 Cir. 1975, 509 F. 2d 1389; Turner v. McKeithen, *supra;* Cousins v.

11/ An interesting application of this rule is found in Van Cleave v. Town of Gibsland, W.D. La. 1974, 380 F. Supp. 135, where a white citizen of a small Louisiana town sought to invalidate a local election in which all of the Town's aldermanic seats were won by black candidates in an all-at-large election. The plaintiff in *Van Cleave* claimed that the at-large voting scheme deprived him of the opportunity to elect a white candidate as alderman because the Town had a slight black voting majority and the ballots were apparently cast along racial lines. The white plaintiff admitted, however, that he had not been denied access to the process of slating candidates and conceded that it was too early to conclude that the black aldermen-elect would not be responsive to the needs of their white constituents. In these circumstances, the district court found that no unconstitutional dilution of the local white vote had occurred, and so rendered judgment for defendants.

City Council of City of Chicago, 7 Cir. 1974, 503 F. 2d 912. Neither does any voter or group of voters have a constitutional right to be included within an electoral district that is especially favorable to the interests of one's own group, or to be excluded from a district that is dominated by some other group. Taylor v. McKeithen, 5 Cir. 1974, 499 F. 2d 893; Gunderson v. Adams, S.D. Fla. 1970, 328 F. Supp. 584, aff'd, 1971, 403 U.S. 913, 91 S. Ct. 2225, 29 L. Ed. 2d 692; *see* Ferrell v. State of Oklahoma ex rel. Hall, W.D. Okl. 1972, 339 F. Supp. 73, aff'd, 406 U.S. 939, 92 S. Ct. 2045, 32 L. Ed. 2d 328. The critical question under *Chavis* and *Regester* is not whether the challenged political system has a demonstrably adverse effect on the political fortunes of a particular group, but whether the effect is invidiously discriminatory, that is, fundamentally unfair.

[8, 9] This Court has decided several dilution cases in recent years, and although we have consistently adhered to the proposition that "access to the political process and not population (is) the barometer of dilution of minority voting strength," Bradas v. Rapides Parish Police Jury, 5 Cir. 1975, 508 F. 2d 1109, 1112, we believe that our decision in this case will be better understood after a discussion of two recent cases involving multi-member electoral districts: Zimmer v. McKeithen, 5 Cir. (en banc) 1973, 485 F. 2d 1297, and Turner v. McKeithen, 5 Cir. 1973, 490 F. 2d 191. 12/ *Zimmer* presented us with the question of whether dilution of black voting rights could occur where blacks constituted a majority of the population of a given polity but a minority of the registered

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12/ Other recent dilution cases in this Circuit include Gilbert v. Sterrett, *supra;* Bradas v. Rapides Parish Police Jury, *supra;* Reese v. Dallas County, 5 Cir. (en banc) 1974, 505 F. 2d 879, revs'd, 1975, — U.S. —, 95 S. Ct. 1706, 43 L. Ed. 2d —, Robinson v. Commisioners Court, 5 Cir. 1974, 505 F. 2d 674; Howard v. Adams County Bd. of Supervisors, 5 Cir. 1972, 453 F. 2d 455, cert. denied, 407 U.S. 925, 92 S. Ct. 2461, 32 L. Ed. 2d 812.

voters, 13/ and where the redistricting plan provided that all the members of the school board and police jury in a rural Louisiana parish would be elected at-large. The district court and a panel of this Court decided that there could not be any dilution of the black vote in such a case. After an exhaustive review of the factual situation underlying the multi-member plan, the en banc Court found that dilution of the black vote could and did exist and would be perpetuated by the all-at-large plan. The existence of a black population majority was not dispositive of the dilution issue, for it is not population but access to the political process that determines whether an interest group enjoys the full vigor of its political rights. Nor could the small size of the parish ensure against dilution, for the size of a multi-member district bears only on the possibility for voter confusion and lack of voter identification with the elected representatives, neither of which is necessary to a finding of dilution. The record in *Zimmer* revealed a long history of racial discrimination in all aspects of local life, a lack of access by blacks to the nomination process, a majority vote requirement, an anti-single shot voting requirement and a history of bloc voting by race, all of which compelled the conclusion that the combination of the white voter majority and the all-at-large system would result in all-white school boards and all-white police juries which would pay little attention to black interests. Also of considerable importance to our result was the fact that there had been a strong Louisiana policy *against* at-large elections for school boards and police juries until 1968, when the pertinent state statute was changed to allow at-large elections for those governmental bodies. Although we did not find it necessary to decide whether this abrupt change in policy–which coincided with increased black voter registration– was racially motivated, we did decide that the new

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13/ For a discussion of *Zimmer*, see 87 Harv. L. Rev. 1851 (1974).

state policy in favor of all-at-large elections was not entitled to great deference where the record showed that the effect of the policy in this parish was to dilute black voting rights. We concluded that the facts in *Zimmer* were indistinguishable from those of *Regester* and that although some multi-member election plans might be constitutional, this one was not.

In Turner v. McKeithen, *supra*, we dealt with another multi-member election scheme for a Louisiana parish police jury. The record in *Turner* contained the usual history and lingering effects of racial discrimination and revealed that although blacks constituted a substantial portion of the parish population, no black had ever been elected to the police jury. The evidence also showed that blacks were neither considered nor consulted in the candidate slating process, but that the black vote was instead solicited "at a stage when the actual candidate selection has already occurred and the possibility for meaningful influence is significantly diminished." 490 F. 2d at 195. Finally, the local policy supporting multi-member districts was the same new and dubious one examined in *Zimmer*. We agreed with the district court that the plan foreclosed effective black participation in the political life of the parish, and we affirmed the trial court's invalidation of the all-at-large scheme.

Zimmer and *Turner* are good examples of the proper application of the principles of the dilution doctrine. The Court in both cases paid close attention to the facts of the particular situations at hand, to the history of studied neglect by elected representatives of the interests of a large number of their own constituents, to the practical effects of electoral schemes which were likely to perpetuate that shameful failure of representation and to the apparent absence of any rational state or local policy in support of the all-at-large plans. We found in both cases that the only way in which blacks would be able to secure a fair hearing of their needs was to order elections to be held on the basis of those single-member districts which the

defendant governing bodies themselves had only recently abandoned.

IV

With respect to the case at bar, we have already discussed the reasons why Ferriday's traditional all-at-large aldermanic election system dilutes the voting rights of local blacks in a substantial and therefore unconstitutional fashion. The situation here is in many respects very like those of *Zimmer* and *Turner*. The long history and continuing effects of racial discrimination, the failure of the local political organizations to consult blacks regarding the slating of candidates, the unresponsiveness of the elected aldermen to the needs of the black community and the Louisiana anti-single shot and majority vote requirements have combined to give the white voting majority an absolute dominion over local politics by means of the all-at-large system. 14/ When the district court found this to be so, the experienced trial judge drew the further conclusion that even a single at-large aldermanic slot would have the same pernicious effect that the all-at-large system had, and the court thus held that only an all-single-member plan would ensure fair political representation for Ferriday's black citizens.

[10] We believe that the trial court was mistaken in adopting its *per se* rule in an area so factually-oriented and practically-based as this one, and we find that a thorough study of the Board's mixed single-member-at-large-member plan requires the conclusion that the scheme is not unconstitutional. If the mixed plan were to be adopted, the political life of Ferriday would differ in several crucial respects from its present configuration. Of primary importance is the fact that the plan

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14/ *See* the quotation from *Zimmer* at p. 6289, *supra*.

assures local blacks of at least two aldermen who will necessarily be accountable to the overwhelming black population of their single-member districts. The Board's mixed plan is a great improvement over its predecessor for other reasons as well. Where there is only one at-large member to be selected in a given polity, neither the anti-single shot law nor the majority vote requirement can invidiously discriminate against minority voters. If there is only one at-large place to be filled and there are minority candidates, then minority voters can vote for minority candidates. If there are no minority candidates, the minority voter can refrain from voting for a majority candidate without voiding his other votes. In a one-party community such as Ferriday, the requirement that a candidate receive a majority of the votes cast in the first primary if he is to avoid a second primary has historically enabled the white majority in Ferriday to defeat in the second primary all black candidates fortunate enough to survive the first primary. If there is only one at-large seat, however, the majority vote requirement is no longer objectionable. Even if the voting in Ferriday continues to be along racial lines and a white candidate defeats a black candidate for the position, it would be difficult to complain about such a result since a majority of the voters are white. Of course, the same thing could be said about the majority vote requirement in an all-at-large setting; however, the effects of this electoral device, standing alone, are not particularly discriminatory in any case and are minimized where there is only one at-large position effected by the rule. The majority vote requirement will no longer be fundamentally unfair to black voters if the Board's mixed plan is implemented. Furthermore, in a community where there is a precarious balance between white and black voting strength and where black voters are in the habit of voting in their own interest, it is improbable that white candidates for the one at-large position will be so confident of the size and racial solidarity of the white vote that such candidates could afford to ignore or offend the nearly 50 percent of the electorate which happens to be black.

Plaintiffs would urge that none of these practical considerations can refute the district court's conclusion that the one at-large position renders the Board's mixed plan unconstitutional, for no one denies that defendants' insistence on the one at-large seat will almost certainly prevent blacks from gaining control of the Board of Aldermen. Plaintiffs contend that the effect of the plan is ample proof of its discriminatory purpose. These arguments might be entitled to great consideration if the governmental interest advanced in support of the at-large device were of the new and questionable sort found in *Zimmer* and *Turner*, for those cases show that a tenuous state policy underlying the preference for at-large districting is a good indication that the scheme is intended to dilute the vote of minority interests. But the situation here is very different from those of *Zimmer* and *Turner* in that respect.

At-large voting in aldermanic elections has been the state policy of Louisiana since 1898; the policy is presently codified as La. Rev. Stat. 33:381. The reason usually given in support of at-large elections for municipal offices is that at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties. While this theory does not always hold true in practice, as the experience of Ferriday's black citizens attests, we cannot say that the rationale is so tenuous that it can be disregarded. Nor have plaintiffs demonstrated that the at-large device here was conceived as a tool of racial discrimination as appeared to be the case in *Zimmer* and *Turner*. When the enabling legislation was passed in 1898, and for the almost 70 years thereafter when the policy was in force across the state, there could have been no thought that the device was racially discriminatory, because very few blacks were allowed to vote in Louisiana during that period. As Judge Wisdom noted in Taylor v. McKeithen, *supra*:

> Historically, there has never been any nexus whatever in Louisiana between the [use of particular electoral devices] and the denial of access of blacks to [public office]. In this century, until this Court compelled parish registrars of voters to register blacks and until the Voting Rights Act of 1965 was enacted and enforced, blacks could not be elected to [public office] –to be blunt–*because there were no black voters*. It is as simple as that. Since adoption of the Louisiana Constitution of 1898 and until recently, the legislature disfranchised blacks overtly; it was never necessary for the legislature to resort to covert disenfranshisement of blacks by manipulating [apparently neutral electoral devices].

499 F. 2d at 896.

[11] We would be callous indeed to tell plaintiffs that seventy years of illegality somehow legitimizes continued dilution of black voting rights, but that is not the thrust of our discussion. In order for there to be substantial–and thus illegal impairment–of minority voting rights, there must be some fundamental unfairness in the electoral system, some denial of fair representation to a particular class. The seventy years of consistent state support of at-large elections for municipal offices strongly suggests that the broad political judgment upon which the policy is based is not racially-motivated, and the lack of racial motivation is at least some evidence of a lack of discriminatory effect. The only evidence that plaintiffs have produced to demonstrate that the Board's plan will have an invidiously discriminatory effect is the suggestion that the very existence of the one at-large position will enable the white voters of Ferriday to control three aldermanic seats instead of two. 15/ Plaintiffs' argument is thus that black votes will be

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15/ *See* n. 7, at p. 6291, *supra*, for a discussion of the limited legislative role of the mayor in Ferriday.

diluted unless their effect is maximized, but we have already seen that the Constitution does not require such a result. See City of Richmond v. United States, 48 USLW 4865 (U.S. June 24, 1975).

[12, 13] Under the mixed plan, the black citizens of Ferriday will certainly command the allegiance of forty percent of the Town's aldermen, a share only slightly lower than the proportion of black voters in the entire electorate; such representation will give blacks that access to the political process which was denied to them under the all-at-large plans here, in *Zimmer* and in *Turner*. This new-found black political power is unlikely to permit the new Board to neglect black interest as former boards have done. 16/ We also believe that the state policy favoring at-large aldermen is not unreasonable, and that this characteristic coupled with the long existence of the policy require that we assign the policy considerable weight in the calculus of dilution. We have also shown that the objectionable aspects of the Louisiana anti-single shot and majority vote requirements will be obviated or minimized under the mixed plan. Our examination of the record and of the probable practical effects of the Board's mixed election plan convinces us that the new scheme will not substantially dilute the voting rights of Ferriday's black citizens and that the plan is not unconstitutional under the rule of *Chavis*, *Regester* and *Zimmer*.

V

Since we have determined that both of the Board's alterna-

16/ We do not imply that plaintiffs in dilution cases can never attack new, untried electoral schemes which are likely to produce unresponsive representatives. The potential that each such plan has for ending historic unconstitutionality of representation or for creating new illegality can be determined only by an examination of the facts of each case.

tive reapportionment plans—the mixed plan and the all-single-member plan—were constitutional, we must now consider whether a federal district court which is presented with two constitutional redistricting plans should choose the one preferred by the governmental unit involved or whether the court should be free to choose the "better" of the two plans. In other words, we must decide if the district court's choice of the all-single-member plan is reviewable only under the abuse of discretion standard, as plaintiffs contend.

[14, 15] At the very beginning of judicial scrutiny of legislative apportionment plans, the *Reynolds* Court cautioned that "legislative apportionment is primarily a matter for legislative consideration and determination, and judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so." 377 U. S. at 586, 84 S. Ct. at 1394, 12 L. Ed. 2d at 541. Since the basis of federal jurisdiction over legal assaults on legislative apportionment is a plaintiff's claim that his right to vote has been abridged in an unconstitutional fashion, 17/ it follows that where there is nothing in a given scheme that is repugnant to the Constitution, a federal court ought not to substitute a plan which might seem to it only to be more efficient or more just than a plan preferred by the legislature concerned. Even when an existing state or local election scheme is unconstitutional, the Supreme Court has consistently ruled that the legislative body involved ought to be given a reasonable opportunity to devise a constitutional plan, and that if the legislature does so,

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17/ Actions brought pursuant to the Voting Rights Act, 42 U.S.C. § 1973c, are constitutional in nature, for a court presented with such a case must decide whether the election plan involved has either the purpose or the effect of abridging the right to vote on account of race or color.

its "freedom of choice to devise [constitutional] substitutes . . should not be restricted beyond the clear commands of the Equal Protection Clause." Burns v. Richardson, 1966, 384 U.S. 73, 85, 86 S.Ct. 1286, 1293, 16 L.Ed.2d 376, 387. In accordance with this rule of deference to state or local legislative policies which are not unconstitutional, the Court has reversed or vacated several federal court decisions where the trial court declined to accept a constitutional state or local plan or failed to accommodate a cognizable legislative policy insofar as possible, in cases where the court was itself forced to draw a reapportionment plan. *See* Gaffney v. Cummings, 1973, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298; Mahan v. Howell, *supra*; Sixty-Seventh Minnesota State Senate v. Beens, 1972, 406 U.S. 187, 92 S.Ct. 1477, 32 L.Ed.2d 1; Whitcomb v. Chavis, *supra*; Burns v. Richardson, *supra*.

[16] As this Court pointed out in Reese v. Dallas County, *supra*, one reason for judicial deference in dilution cases is a "respect for the institutional limitations on the courts' ability to gauge the ramifications of districting patterns. . . [In dilution cases,] the courts must evaluate evidence of the political alignments of allegedly disadvantaged factions and infer the intent of the legislature from actions that may have several plausible motives." 505 F.2d at 887. Our discussion of the political situation in Ferriday is a good illustration of the often ambiguous circumstantial evidence which is frequently the only evidence available to plaintiffs in dilution suits. We have joined with plaintiffs, defendants and the district court in speculation about the probable effects of particular facets of the traditional electoral mechanism in Ferriday, and everyone concerned has necessarily engaged in predictions of the results of the Board's proposed mixed election plan. Although courts must frequently attempt to define the undefinable and render judgments on the basis of uncertain or unknowable factors, the particular difficulty in dilution cases is that the factors to be weighed are often political in nature, and everything in our political learning teaches us that legislatures are better equipped than

courts to balance all of the competing interests involved in legislative apportionment, unless the legislature's balancing is so fundamentally unfair as to be unconstitutional. 18/ *See* White v. Weiser, 1973, 412 U.S. 783, 795–96, 93 S.Ct. 2348, 2354–2355, 37 L.Ed.2d 335, 346; Lytle v. Commissioners of Election, 4 Cir. 1974, 509 F.2d 1049, 1051–52; The Supreme Court, 1966 Term, 81 Harv.L.Rev. 69, 154–55 (1967); Comment, Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence, 41 U.Chi.L. Rev. 398, 409–11 (1974).

We might therefore conclude that the district court was in error when it failed to adopt the Board's constitutional mixed single-member-at-large-member electoral scheme. Plaintiffs contend, however, that even if the Board's mixed plan is constitutional, the district court was within the bounds of reasoned discretion when it ordered the implementation of the all-single-member plan as the more equitable alternative. They base this equitable remedy standard on our *Turner* decision and on the Supreme Court's recent decision in Chapman v. Meier, 1975, —— U.S. ——, 95 S.Ct. 751, 42 L.Ed.2d 766. Plaintiffs argue that *Turner* and *Chapman* draw a distinction between apportionment plans already in operation and proposed schemes advanced by legislatures for adoption only in the event that the existing districting system is found to be unconstitutional. Even if the first variety of plan deserves judicial deference, plaintiffs contend that there is no reason for courts to defer to the legislative judgment for fear of dislocating the electoral mechanism where a new plan must be implemented in any event.

18/ It is for this reason that evidence of discriminatory legislative intent is so valuable in dilution cases, for where illegal discrimination is the legislative interest underlying the election scheme, such an "interest" deserves no judicial deference.

[17] A major defect in plaintiffs' argument is that courts do not defer to legislative judgments regarding reapportionment out of concern that judicial intervention will cost time, money or personal inconvenience to the affected parties. We have just shown that courts usually defer to legislative preferences because of the complex political judgments involved in reapportionment plans. In short, it does not matter whether the legislature's plan is operational or merely prospective. Nor does *Turner* offer any solace to plaintiffs. Although it is true the we affirmed the district court's choice of the black plaintiffs' reapportionment plan in that case, the fact is that the defendant police jury in *Turner* elected to stand on the existing all-at-large election scheme, so that when the trial court found that system to be unconstitutional, it had the choice of adopting the plaintiffs' admittedly constitutional plan or creating one of its own. There was no question of choosing one of two acceptable plans; the district court instead picked the *only* acceptable plan. Finally, *Chapman* was a case where a federal district court drew its own reapportionment plan for the North Dakota state legislature and utilized multi-member districts for the state senate. The unusual thing about this procedure was the fact that the North Dakota legislature had never used such districts in its own plans. In these circumstances, the Supreme Court applied the rule of Connor v. Johnson, *supra*, and held that since multi-member districts were disfavored electoral tools, federal courts gernerally ought not to include them in plans of their own creation. The Court's determination was based not on any constitutional considerations but on its supervisory powers over federal courts. — U.S. at —, 95 S. Ct. at 761, 42 L. Ed. 2d at 779. There was no departure in *Chapman* from the rule of judicial deference with respect to reapportionment plans. On the contrary, the Court specifically stated that "the standards for evaluating the use of multimember districts . . . clearly differs depending on whether a federal court or a state legislature has initiated the use." — U.S. at —, 95 S. Ct. at 762, 42 L. Ed. 2d at 779-80, and warned that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." — U.S. at —, 95 S. Ct. at 766, 42 L. Ed. 2d at 784-85.

[18] There is no legal basis for plaintiffs' arguments in support of the district Court's choice of redistricting plans. We conclude that the trial court should have adopted the mixed plan in deference to the Board of Aldermen's considered preference for a plan incorporating one at-large place into the aldermanic election scheme.

VI

The district court awarded attorneys' fees to plaintiffs on the basis of the "common benefit" and "private attorney general" rationales. The court reasoned that such an award was proper in that plaintiffs' action has rid Ferriday of a blatantly unconstitutional aldermanic election system, thereby rendering a signal service to Ferriday's black citizens–the full effectuation of their voting rights–and aiding the congressional intention embodied in 42 U.S.C. § 1983. 377 F. Supp. 1192, 1202-08. We believe that the common benefit or "common fund" rationale of Mills v. Electric Auto-Lite Co., 1970, 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593, and Sprague v. Ticonic National Bank, 1939, 307 U.S. 161, 59 S. Ct. 777, 83 L. Ed. 1184, is inapposite here because there was no fund created by the litigation, and no indication that an award of attorneys' fees against the Board of Aldermen will spread the costs of the lawsuit proportionately among the class that will benefit from this litigation. *See* Hall v. Cole, 1973, 412 U.S. 1, 93 S. Ct. 1943, 36 L. Ed. 2d 702.

At the time of the district court's decision, its award of attorneys' fees on the private attorney general rationale was certainly justified by the general application of that rule by the

lower federal courts. *See, e.g., Fairley v. Patterson*, 5 Cir. 1974, 493 F. 2d 598; Lee v. Southern Home Sites Corp., 5 Cir., 1971, 444 F. 2d 143; Yelverton v. Driggers, M.D. Ala. 1974, 370 F. Supp. 612, Sims v. Amos, M.D. Ala. 1972, 340 F. Supp. 691, aff'd, 409 U.S. 942, 93 S. Ct. 290, 34 L. Ed. 2d 215. In the very recent case of Alyeska Pipeline Service Co. v. Wilderness Society, 1975, — U.S. —, 95 S. Ct. 1612, 44 L. Ed. 2d 141, however, the Supreme Court has unequivocally declared that the private attorney general rule cannot support the award of attorneys' fees in federal cases, in the absence of a specific statutory mandate. After a thorough review of the general "American rule" against the award of attorneys' fees, the *Alyeska Pipeline* Court decided that the current trend towards invocation of the private attorney general exception was about to eradicate the general rule in many types of lawsuits. The Court expressed no opinion on the merits of the general rule, but rather based its decision on the consideration that Congress–and not the courts–has the responsibility to make specific exceptions to the rule against award of attorneys' fees:

> It appears to us that the [private attorney general rule] would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress . . . has been to carve out specific exceptions to [the] general rule . . ., [federal courts] are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases . . .

— U.S. at —, 95 S. Ct. at 1627, 44 L. Ed. 2d at 159-60.

The *Alyeska Pipeline* Court explicitly placed awards of

attorneys' fees in section 1983 actions within the prohibition of its decision and specifically disapproved our *Fairley* and *Lee* cases which had espoused the theory upon which the district court relied. We thus have no doubt that *Alyeska Pipeline* precludes any award of attorneys' fees to plaintiffs on the theory that they have acted as private attorneys general.

However, the district court also found that "the Board of Aldermen's steadfast adherence to a constitutionally unacceptable plan during the course of this litigation would amount to bad faith," 377 F. Supp. at 1206, and that finding is supported by the record, although the able trial judge preferred to base his award on what at the time seemed to be the equally solid ground of the private attorney general rule. The Supreme Court recognized in *Alyeska Pipeline* that the "bad faith" rationale was an assertion of "inherent [equitable] power in the courts to allow attorneys' fees in particular situations," — U.S. at —, 95 S. Ct. at 1622, 44 L. Ed. 2d at 154, and found no defect in that exception to the general rule. *See also* F.D. Rich Co., Inc. v. United States for Use of Industrial Lumber Co., Inc., 1974, 417 U.S. 116, 129, 94 S. Ct. 2157, 2165, 40 L. Ed. 2d 703, 713-14. Since I believe that the district court's award of attorneys' fees to plaintiffs is justified by its finding of defendants' bad faith in the defense of an obviously unconstitutional election scheme, I would affirm the trial court's order in that regard. My brothers Roney and Grooms, however, have concluded that the order awarding attorneys' fees should be vacated, for the reasons given in Judge Roney's concurring opinion.

VII

We hold today that pursuant to the rule of rational empiricism announced by *Chavis* and *Regester*, Ferriday's traditional all-at-large aldermanic election system has operated to dilute the voting rights of the Town's black citizens by depriving them of meaningful representation on the Board of

Aldermen and thus denying them any hope of consideration in the affairs of the community in which they live. On the other hand, close scrutiny of the record convinces us that the fact that the all-at-large plan is unconstitutional does not mean that no at-large places at all can be tolerated in the circumstances of this case. We find that the Board's mixed plan will have no unconstitutional impact upon the voting rights of anyone in Ferriday. Due deference to the long-established Louisiana policy favoring at least some at-large positions in aldermanic elections leads us to conclude that the Board's preference for the mixed plan must override the district court's preference for the all-single-member plan.

[19] We do not write today concerning every election plan in every city and town in this Circuit for all time to come; we deal only with a particular proposed aldermanic election scheme in Ferriday, Louisiana. We sympathize with the position of the able trial judge who, when faced with overwhelming evidence of longstanding political injustice, perhaps leaned over backwards to ensure that the wrongs of many generations were righted by his order in this case. The Constitution, however, demands not racial representation by ratio but racial equity in the political process, and although the traditional aldermanic election plan in Ferriday has illegally abridged the voting rights of local blacks, there is nothing here to show that the Board's new and very different plan will yield similarly unconstitutional results. *See* Dallas County v. Reese, 1975, — U.S. —, 95 S. Ct. 1706, 43 L. Ed. 2d —; Dusch v. Davis, 1967, 387 U.S. 112, 117, 87 S. Ct. 1554, 1556, 18 L. Ed. 2d 656, 660. We are not prepared to presume, as plaintiffs do, that no white person in Ferriday can fairly represent a black person. If our faith in the future be mistaken, if the one at-large aldermanic position should perpetuate white office-holder underrepresentation of black interests, the courthouse door will not be locked against anyone who may be effectively disenfranchised by the electoral scheme we approve today.

Affirmed in part; reversed in part; vacated in part and remanded.

GROOMS, District Judge.

In concur in Judge Goldberg's opinion, except as to his position on the award of attorney's fees. In concur in and adopt Judge Roney's opinion on that issue.

Roney, Circuit Judge (specially concurring).

The appellants conceded before this Court that the all-at-large election scheme was unconstitutional. It seems to me that we should start with that concession and that we are relieved of any judicial necessity to decide the correctness of the district court's decision in this regard. I would not voice an opinion one way or the other, then, as to the validity of the all-at-large election scheme in this town of 5,200 people.

With that concession, the only issue for us to decide is whether the appellant town's mixed single-member-at-large-member electoral system is constitutional such to make erroneous the district court's ordered implementation of appellee's all-single-member plan. I fully concur in the decision that the Board of Aldermen's plan is constitutional and in Judge Goldberg's thorough and well-reasoned opinion dealing with this issue.

[20] With respect to the district court's award of attorney's fees, I would vacate and remand for reconsideration by the district court in light of two factors: the demise of the private attorney general rationale in Alyeska Pipeline Service Co. v. Wilderness Society, — U.S. —, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975), and our decision here that the Board of Aldermen's plan submitted to the district court is constitutional.

First, it is impossible to tell to what extent the district court's reliance on the attorney general rationale may have permeated its finding that bad faith likewise supported the attorney's fee award. The issue of attorney's fees should be reconsidered by the district court on the issue of bad faith alone.

Second, the district court had decided that the plan proffered by the town was unconstitutional when it found that "the Board of Aldermen's steadfast adherence to a constitutionally unacceptable plan during the course of this litigation would amount to bad faith." 377 F. Supp. at 1206. The issue of bad faith should be reconsidered in light of the fact that, having lost its defense of the all-at-large plan, the Board did submit a constitutionally acceptable plan to the district court. It is for the district court to decide whether, in light of this fact, there was "steadfast adherence to a constitutionally unacceptable plan."

The town briefed on appeal the issue as to the district court's finding that the all-at-large plan was unconstitutional, but then conceded the point on oral argument. All of these facts should be remanded to the district court to reconsider anew the issue of bad faith. I would not indicate one way or the other which way that issue should be resolved.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 26, 1976

Eric Schnapper, Esq.
Suite 2030
10 Columbus Circle
New York, N.Y. 10019

RECEIVED
NORMAN MAGEE'S OFFICE
Date 5-3-76

RE: WALLACE, SR., ET AL. v. HOUSE, ETC.,
75-914

Dear Sir:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *East Carroll Parish School Board v. Marshall*, 424 U.S. ____ (1976) and Public Law 94-73 (August 6, 1975).

cc: Norman Magee, Esq.
Magee Bldg.
1007 North Fourth St.
Ferriday, La. 71334

Very truly yours,

Michael Rodak, Jr., Clerk
By
/s/ Helen Taylor
Helen Taylor (Mrs.)
Assistant Clerk

Kendall L. Vick, Esq.
Asst. Attornet General of Louisiana
7th Floor, 2-3-4 Loyola Bldg.
New Orleans, La. 70112

George WALLACE, Sr., et al.,
Plaintiffs-Appellees,

v.

J.P. HOUSE, Individually and as Registrar of Voters
of Concordia Parish, Louisiana, et al., Defendants,

L.W. Davis, etc., et al.,
Defendants-Appellants.

No. 74-2654.

United States Court of Appeals,
Fifth Circuit.

Sept. 17, 1976.

Black citizens brought civil rights class action challenging town's all-at-large aldermanic election scheme. The United States District Court for the Western District of Louisiana, Benjamin C. Dawkins, Jr., J., 377 F. Supp. 1192, held the at-large scheme unconstitutional and adopted second alternative plan submitted by board, providing for five single-member districts. On defendants' appeal, the Court of Appeals, 515 F. 2d 619, held that both alternative plans submitted by the board were constitutional and that the "mixed" plan, which the board preferred, should have been adopted. The Supreme Court, however, 96 S. Ct. 1721, vacated and remanded for reconsideration in light of East Carroll Parish School Board v. Marshall. Upon remand, the Court of Appeals, Goldberg, Circuit Judge, held that when district courts are forced to fashion reapportionment plans, the general rule is that single-member districts are to be preferred; that assuming special circumstances might conceivably be so compelling that a district court would be

required to order some multimember districting, some special circumstances might justify a choice of at-large districting but not compel that choice; that the record was sufficient to enable the Court to determine, without remanding, whether the lower court abused its discretion in ordering the single-member plan; that no sufficient showing of special circumstances was made to justify a holding that the lower court abused its discretion in choosing the all-single-member plan; and that the Voting Rights Act would be applied retroactively to allow an award of attorneys' fees.

Affirmed.

1. Municipal Corporations Key 80

In fashioning remedial relief subsequent to finding an existing apportionment plan unconstitutional, a federal district court must, absent special circumstances, order a single-member reapportionment plan, and it need not reject an all-at-large or mixed plan as unconstitutional in order to justify its choice of an all-single-member plan.

2. Municipal Corporations Key 80

Where a district court, in fashioning remedial rellef subsequent to finding an existing apportionment plan unconstitutional, departs from the favored single-member plan and chooses a plan containing at least one at-large district, the court must justify its rejection of the favored alternative by demonstrating that there are special circumstances that mandate this choice; but where the court orders single-member districting in the first instance, the question on appeal then becomes whether the presumptively proper choice must be overturned as an abuse of discretion.

3. Municipal Corporations Key 80

Assuming that special circumstances may conceivably be so

compelling that a district court, subsequent to finding an existing apportionment plan unconstitutional, would be required to order some multimember districting, there might be special circumstances that would suffice to justify the district court's exercise of discretion in ordering at-large districting but would not be sufficient for an appellate court to overturn a district court's discretionary choice of single-member districting; in other words, some special circumstances might justify a choice of at-large districting but would not compel that choice.

4. Municipal Corporations Key 80

Where application of single-member districting in a particular case reveals greater weaknesses in the single-member plan, a district court may decide that creation of at least one at-large district would better serve the values of fair representation and political access.

5. Municipal Corporations Key 80

Because the district court found that "mixed plan" for aldermanic elections unconstitutionally would dilute black voting strength and therefore ordered single-member plan, a fortiori, the court implicitly decided that the mixed plan would dilute black voting strength to some extent and not serve the values of fair representation and political access better than the single-member plan.

6. Courts Key 406.9(2)

Record was sufficient to enable the Court of Appeals to determine, without remanding, whether the district court abused its discretion in ordering single-member districting plan for town aldermanic elections in Ferriday, Louisiana.

7. Courts Key 406.3(24)

When the district court, subsequent to finding an existing apportionment plan unconstitutional, orders remedial relief in the form of single-member districting in the first instance, an appellate court may overturn that presumptively proper choice only if the findings of fact from which the district court failed to discern special circumstances are clearly erroneous, or the failure to discern special circumstances from the facts found is an abuse of discretion as a matter of law.

8. Municipal Corporations Key 80

No sufficient showing of special circumstances was made to justify a holding that the district court, in fashioning remedial relief subsequent to finding town's all-at-large aldermanic election plan unconstitutional, was precluded from exercising its discretion to choose an all-single-member plan.

9. Municipal Corporations Key 80

That an at-large aldermanic election plan affords minorities greater political access is a necessary though perhaps not a sufficient condition for holding that a district court cannot choose single-member districting in fashioning remedial relief subsequent to finding an existing apportionment plan unconstitutional.

10. Municipal Corporations Key 80

Balance of voting strength is not of independent importance in showing "special circumstances" justifying an at-large aldermanic election plan, but it may be relevant insofar as it demonstrates that an at-large or mixed plan might afford minorities greater political access or that a single-member plan is constitutionally defective.

11. Courts Key 406.9(3)

Voting Rights Act provision permitting a court in its discretion to award attorney's fees to the prevailing party in any action or proceeding to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments may be applied retroactively to a case on appeal at the time of its enactment. Voting Rights Act of 1965, § 14(e) as amended 42 U.S.C.A. § 1973*l* (e); U.S. C.A.Const. Amends. 14, 15.

12. Courts Key 406.9(3)

Appropriate test for the retroactive application of amendments permitting awards of attorneys' fees in cases pending on appeal was articulated in the Supreme Court's "Bradley" decision, i. e., courts should apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.

Appeal from the United States District Court for the Western District of Louisiana.

Before GOLDBERG and RONEY, Circuit Judges, and GROOMS, District Judge.

GOLDBERG, Circuit Judge:

This case comes before us for the second time, our earlier decision having been vacated and remanded by the Supreme Court for reconsideration in light of *East Carroll Parish School Board* v. *Marshall*, 1976, — U.S. —, 96 S.Ct. 1083, 47 L.Ed. 2d 296 (per curiam), and Public Law 94-73 [42 U.S.C. §

1973*l*(e)] ..1/

East Carroll purports to defoliate the political thicket in which we have been wandering for some years. In our travels, we had, whenever possible, sought guidance from the local legislature, thereby seeking the goal of judicious redistricting through some constitutional route proposed by a representative body. We traversed this path in our original opinion, holding that where an existing apportionment plan has been held unconstitutional and the district court is put to the task of fashioning a remedial plan, it ought to defer to a constitutional plan preferred by the local legislative body. The Supreme Court's contemporary cartography commended this route to us.

In *East Carroll*, however, the Court declaimed that when the legislative body has once strayed from the path of constitutional rectitude and the district court is charged with fashioning a remedial apportionment plan, the court need pay no heed to the legislative preference for at-large districts. The Board of Aldermen of Ferriday, Louisiana, left that constitutional path by imposing on the town's citizens an all-at-large aldermanic election scheme that diluted the votes of black citizens; we can therefore no longer follow the Board's directions through the thicket. Having cleared away the underbrush, the Supreme Court has given us a route to be followed over all but the most inhospitable terrain: in fashioning remedial districting schemes, federal district courts are to order single-member plans absent special circumstances.

We must review under the guidelines established in *East Carroll* the district court's choice of a single-member reapportionment scheme, and under the authority of 42 U.S.C. § 1973*l*

1/ *Wallace v. House*, 1976, — U.S. —, 96 S. Ct. 1721, 48 L. Ed. 2d 191, vacating and remanding, 5 Cir. 1975, 515 F. 2d 619.

(e) the lower court's award of attorneys' fees to plaintiffs. We affirm the district court's judgment on both questions, thereby bringing closer to resolution this dispute between the black citizens of Ferriday, Louisiana, and the Board of Aldermen, which proposed to supplant the town's unconstitutional all-at-large aldermanic election scheme with a plan that would retain one at-large member. To the town's black citizens, the single at-large seat retained in the Board's preferred plan represents the fulcrum of continued white political control.

1. The District Court's Choice of Districting Plans

On June 13, 1972, the black candidates for election to the Ferriday, Louisiana, Board of Aldermen filed this class action under 42 U.S.C. § 1983 in federal district court. Plaintiffs charged that Ferriday's all-at-large voting scheme impermissibly diluted the votes of local blacks and asked for appropriate declaratory and injunctive relief. The court ordered each party to submit alternative redistricting plans. The Board submitted two redistricting plans to the district court. 2/ The plan first submitted (the mixed plan) divided Ferriday into four single-member districts and one at-large district encompassing the entire town. The second plan (the all single-member plan) created five single-member aldermanic districts. A bench trial was held on April 24 and 25, 1974, after which the district court concluded that only single-member aldermanic districts would sufficiently guarantee to black voters the full efficacy of their right of suffrage.

The Court found both the existing all-at-large plan and the Board's preferred mixed plan unconstitutional. The mixed plan was "clearly constitutionally infirm because of the special racially discriminatory effect of that plan in the context of this

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2/ The plaintiffs submitted a plan for five single-member districts that does not differ significantly from the Board's single-member plan.

case." *Wallace v. House*, W.D.La. 1974, 377 F.Supp. 1192, 1200. The mixed plan would have created two "safe" white seats and two "safe" black seats. The pivotal at-large aldermanic seat would likely have been controlled by Ferriday's white voting majority. 3/ A fairly drawn single-member plan, on the other hand, "ordinarily will result in blacks having a majority in three of the five districts." *Id.* at 1200. The mixed plan was also unconstitutional in the district court's view because, like the existing all-at-large plan, it operated to dilute the voting strength of black citizens and prevented them "from participating equally with white citizens in the political process . . .." *Id.* at 1199.

On appeal, it was conceded that Ferriday's all-at-large aldermanic election scheme operated to dilute the votes of the black citizens of the town in violation of their Fourteenth and Fifteenth Amendment rights. The problem was whether the district court made the proper choice between the alternative plans submitted by the Board of Aldermen. We held that the trial court was mistaken in adopting a *per se* rule that even a single at-large aldermanic seat would have the same pernicious effect as the previously all-at-large scheme, that the Board's mixed plan was not unconstitutional, and that the Board's preference for the mixed plan must override the district court's preference for the all single-member plan. 515 F.2d at 632, 636. Our panel decision was vacated and remanded by the Supreme Court for reconsideration of this question in light of *East Carroll.*

In *Zimmer v. McKeithen*, 5 Cir. 1973, 485 F.2d 1297 (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 1976, — U.S. —, 96 S.Ct. 1083, 47 L.Ed.2d 296 (per curiam), we reversed a district court decision approving an at-large reapportionment plan submitted by the East Carroll Police Jury. A district court had ordered a change from ward to at-large voting in East Carroll Parish in 1968. The Parish Police Jury subsequently resubmitted the at-large plan pursuant to a district court order to submit a reapportionment plan in light of the 1970 census. Black voters in *East Carroll* challenged the propriety of the plan under, *inter alia*, the Fourteenth and Fifteenth Amendments. The district court found that the at-large plan did not dilute black voting strength and ordered police jury and school board elections under the at-large plan. 5/ A panel of the Fifth Circuit affirmed, 467 F.2d 1381, but on rehearing *en banc*, this Court reversed, 485 F.2d 1297. We found clearly erroneous the trial court's findings that at-large elections would not dilute the black voting strength of East Carroll Parish.

3/ Ferriday's population is closely divided between whites and blacks. The 1970 census showed about 3,000 blacks (58%) and 2,200 whites (42%). Whites enjoy a slight edge in voter registration over blacks 1,571 (50.5%) to 1,538 (49.5%). Any discrepancy is explained by the fact that there are relatively more whites of voting age in Ferriday than there are blacks.

4/ The Board admitted to this Court at oral argument that plaintiff's dilution case had not been rebutted with respect to the existing all-at-large aldermanic districting scheme and that the existing scheme was unconstitutional. The trial judge properly found the all-at-large plan irremediably defective and correctly ordered the Board to submit a constitutional plan for his approval. 515 F.2d at 624.

5/ Under this scheme, six of the seven wards were to elect one representative to the police jury and school board, and one ward was to elect three representatives. Although candidates were required to reside in the ward from which they sough election, they were to be voted upon by registered voters in the entire county. 485 F.2d at 1301.

In affirming our *en banc* decision, the Supreme Court found it unnecessary to reach the constitutional merits of the proffered at-large plan. The Court held simply that the district court had abused its discretion in failing initially to order a single-member reapportionment plan. The Court reaffirmed the rule "that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances." — U.S. at — , 96 S.Ct. at 1085. Had the Court been articulating a new test, a remand might have been appropriate. But the Court, finding it "inexplicable" that our *en banc* opinion had declined to rest on this "frequently reaffirmed" rule, did not remand to determine whether there were special circumstances. Instead, the Court reasoned that the *en banc* opinion "amply demonstrates [that] no special circumstances here dictate the use of multimember districts."

[1] *East Carroll* makes clear that in fashioning remedial relief subsequent to finding an existing apportionment plan unconstitutional, a federal district court must, absent special circumstances, order a single-member reapportionment plan. A district court need not reject an all-at-large or mixed plan as unconstitutional in order to justify its choice of an all-single-member plan. A reviewing court need not reach the constitutionality of the mixed plan to decide whether the district court's choice was proper. When district courts are forced to fashion reapportionment plans, the general rule is that single-member districts are to be preferred. *East Carroll, supra*, — U.S. — , 96 S.Ct. at 1085; *Chapman v. Meier*, 1975, 420 U.S. 1, 17-19, 95 S.Ct. 751, 761-62, 42 L. Ed. 2d 766, 778-80; *Mahan v. Howell*, 1973, 410 U.S. 315, 333, 93 S. Ct. 979, 989, 35 L.Ed. 2d 320, 335; *Connor v. Williams*, 1972, 404 U.S. 549, 551, 92 S.Ct. 656, 658, 30 L.Ed. 2d 704, 707; *Connor v. Johnson*, 1971, 402 U.S. 690. 692, 91 S.Ct. 1760, 1762, 29 L. Ed. 2d 268 (per curiam).

[2] Two paradigm situations will arise under this rule. In the first paradigm, a district court departs from the favored single-member plan and chooses a plan containing at least

one at-large district. In this case the trial court must justify its rejection of the favored alternative by demonstrating that there are special circumstances that mandate this choice 6/ In the second paradigm, the district court orders single-member districting in the first instance. The question on appeal then becomes whether the presumptively proper choice of the district court must be overturned as an abuse of discretion. In *East Carroll* the district court had ordered at-large districting (the first paradigm), whereas here the district court ordered single-member districting (the second paradigm). In that case the question was whether special circumstances justified the district court's choice; in this case the question is whether special circumstances compelled the district court to reject all-single-member districting and to order an at-large district 7/

Applying the rule reaffirmed in *East Carroll* to the facts of this case requires a three-state inquiry. First, we must face the threshold question whether it can ever be an abuse of discretion for a district court, having found unconstitutional the existing apportionment plan, to order remedial relief in the form of single-member districting. Second, we shall decide, in light of the unique procedural posture of this case,

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6/ See *Chapman v. Meier*, supra, 420 U.S. at 26, 95 S. Ct. at 766.

> We hold today that unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts
> Where important and significant state considerations rationally mandate departures from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted."

7/ In *East Carroll*, all candidates were to be elected on an at-large basis, whereas here the Board proposed a mixed rather than all-at-large plan. That does not disturb the Supreme Court's preference for single-member districts or obviate the need to show special circumstances. Where a district court's plan involved thirty-seven single-member districts and one multimember district, the Court nevertheless required that special circumstances justify the latter. *Mahan v. Howell*, 1973, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320.

whether we must remand to the district court for a finding of whether there were "special circumstances." Upon answering this question in the negative, we shall decide whether the district court abused its discretion by ordering a single-member plan.

East Carroll and other cases of the first paradigm tell us that a district court abuses its discretion if it orders at-large or multi-member districting absent special circumstances, but they cannot answer the threshold question here, Because cases discussing the matter generally say that a district court may order at-large districts if there are special circumstances,8/ not that a district court must do so, there are grounds for believing that, barring the unconstitutionality of a single-member plan, district courts cannot abuse their discretion by ordering single-member districting. On the other hand, a dictum from *East Carroll* suggests that sometimes the presence of special circumstances will "dictate the use of multimember districts." — U.S. at — , 96 S.Ct at 1085. We shall assume that special circumstances may conceivably be so compelling that a district court would be required to order some multi-member districting.

[3] On this assumption, however, there may be special circumstances that would suffice to justify a district court's exercise of discretion in ordering at-large districting but would not be sufficient for an appellate court to overturn a district court's discretionary choice of single-member districting. In other words, some special circumstances might justify a choice of at-large districting but would not compel that choice. This distinction is important in the instant case. It means that appellants' burden is particularly heavy, for they must show not merely that the district court could have ordered an at-large district but that on a correct reading of the facts the lower court was compelled to do so as matter of law.

8/ See, e.g., *Zimmer v. McKeithen*, supra, 485 F.2d at 1308.

Our second task is to decide whether to remand this case to the district court to decide whether there are sufficiently compelling special circumstances to require an at-large district. Since this case comes to us on remand from the Supreme Court after *East Carroll*, it might be argued that the district court has never had a chance to decide whether there were such special circumstances under *East Carroll's* test and that we should therefore remand. Four considerations prove fatal to this argument.

First, in *East Carroll* itself the Supreme Court faced a situation where, had the test required it, a remand would have been appropriate. The Court nevertheless chose not to remand but reasoned simply that the *en banc* opinion of this Court "amply demonstrates [that] no special circumstances here dictate the use of multi-member districts." It must be remembered that there the district court had ordered an at-large plan, so that defendants needed only to show special circumstances that would justify that decision; here the burden of those seeking an at-large district is to show that such a district was required. If no remand was ordered in the former case, where on this assumption opponents of the single-member plan had a lighter burden to carry, we should be hesitant to remand here. The Supreme Court is forthright with its words and had it wanted us to remand for a finding of fact it would have so ordered.

Second, a basic reason no remand was required in *East Carroll* and none should be required here is that the *East Carroll* Court was not articulating a new test but refining a test first announced in *Connor v. Johnson*, 1971, 402 U.S. 690, 692, 91 S.Ct. 1763, 1762, 29 L.Ed.2d 268 (per curiam). Were there "special circumstances," the district court could not only have found them but also could have denominated them as such. The term, "special circumstances," encompasses only the rare, the exceptional, not the usual and diurnal. Appellants raise no factual matters of which the district court was un-

aware. The parties have already waited six years since this litigation began. Elections must soon be held. A remand would serve no useful purpose.

[4] Third, it must be recognized that the term "special circumstances" is possessed of no talismanic significance. It merely represents the Supreme Court's recognition that a "singular combination of unique factors" may sometimes permit a district court to conclude that the policies underlying the general preference for single-member districting are outweighed by grave defects of single-member districting as applied to the particular case. *Mahan v. Howell, supra,* 410 U.S. at 333, 93 S.Ct. at 335. The general preference for single-member districting plans is founded on a judgment that the weaknesses of multi-member or at-large plans tend to impair fair representation and impede access to the political process. The practical weaknesses of at-large plans include "their tendency to submerge minorities" *Whitcomb v. Chavis,* 1971, 403 U.S. 124, 158–59, 91 S.Ct. 1858, 1877, 29 L.Ed.2d 363, 384–385, and the possible unresponsiveness of at-large members to residents of particular areas within the district. *See generally Chapman v. Meier,* 1975, 420 U.S. 1, 14–18, 95 S.Ct. 751, 760–62, 42 L.Ed.2d 766. Where application of single-member districting in a particular case reveals greater weaknesses in the single-member plan, however, a district court may decide that creation of at least one at-large district would better serve the values of fair representation and political access.

In the opinion of this court *en banc* in *Zimmer,* Judge Gewin summarized the kinds of circumstances that might justify a district court's choosing an at-large plan. Where the district court's approval of an at-large plan "is challenged merely as an abuse of discretion," *Connor v. Johnson's* preference for single member districts may be overridden when special circumstances obtain:

> ests would be advanced by the use of multi-member districts and the use of single members districts would jeopardize constitutional requirements, it can employ multi-member districts . . . .
>
> The preference may also yield where a district court determines that multi-member districts afford minorities a greater opportunity for participation in the political process than do single member districts . . . . [A] court may in its discretion opt for a multimember plan which enhances the opportunity for participation in the political processes. 9/

One example of a case in which the Supreme Court found special circumstances is *Mahan v. Howell,* 1973, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320. In that case the Court approved the use of multi-member districts as an interim remedy to alleviate substantial underrepresentation of military personnel in an impending election. 10/

9/ *Zimmer, supra,* 485 F.2d at 1308. The Supreme Court seems to have understood Judge Gewin to be establishing only the circumstances under which an at-large plan would be constitutional. *East Carroll, supra,* — U.S. at — , 96 S.Ct. at 1085, 47 L.Ed.2d at 298. But Judge Gewin is here addressing the limits of judicial discretion in ordering an at-large plan assuming there is no question of its constitutionality.

10/ In *Mahan, supra,* 410 U.S. at 333, 93 S.Ct. at 989, the Court stated that the district court "was confronted with plausible evidence of substantial malapportionment with respect to military personnel, the mandate of this Court that voting discrimination against military personnel is constitutionally impermissible, *Davis v. Mann, supra,* 377 U.S. [678] at 691–692, 84 S.Ct. [1441, at 1448, 12 L.Ed.2d 609], and the fear that too much delay would have seriously disrupted the fall 1971 elections. Facing as it did this singular combination of unique factors, we cannot say that the District Court abused its discretion . . ..

Appellants do not allege that the single-member plan would threaten the constitutional rights of some voters, as in *Mahan*, nor do comparable circumstances in fact obtain in this case. In any event, we are not faced with a situation like that in *Mahan* or *East Carroll* where the district court ordered at least some multi-member districting; here the district court ordered single-member districting in the first instance. There is no need to remand to determine whether the single-member plan suffers from grave weaknesses. In endorsing the plan, the district court found that it suffered from no constitutional defects. 377 F.Supp. at 1200. It strains the imagination to suppose that reminding the district court of the appellation, "special circumstances," would inspire it to a vision of the plan's grave weaknesses where before it saw none.

[5] Fourth, we need not remand to decide whether special circumstances dictate approval of the mixed plan because the district court has already implicitly found that the mixed plan affords the black voting minority not greater but diminished opportunity for access to the political process. To be sure, the district court found that the mixed plan would unconstitutionally dilute the black vote and eventuate in a racially discriminatory result. We did not agree with that constitutional finding in our earlier opinion and need not do so now. The district court's criticism of the mixed plan need not be of constitutional dimension to be decisive under *East Carroll*. The argument is *a fortiori*: because the district court found that the mixed plan unconstitutionally dilutes black voting strength and ordered the single-member plan, it is implicit that the district court decided that the mixed plan dilutes black voting strength to some extent and does not serve the values of fair representation and political access better than the single-member plan.

[6] In sum, the present record is sufficient to enable us to determine without remanding whether the district court abused its discretion in ordering the single-member plan. In *East Carroll* itself, the Supreme Court saw no need to remand. That

single-member districting is to be preferred "absent special circumstances" by a district court shaping remedial relief is not a new test announced in *East Carroll* but an existing rule reaffirmed in that case. The district court has already decided that the single-member plan jeopardized no constitutional requirements. Finally, the district court did not find that the mixed plan affords minorities a greater opportunity for participation in the political process than the all single-member scheme. Rather, its constitutional objections to the mixed plan imply a finding that the mixed plan is, at the very least, not superior to the single-member plan in this respect.

[7] Having determined that we need not remand, we must now decide whether the district court abused its discretion. Although *East Carroll*, *Mahan*, and other cases considered were instances of the first paradigm, where the district court orders multi-member or at-large districting, these cases lead us to conclude that when the district court orders remedial relief in the form of single-member districting in the first instance, an appellate court may overturn that presumptively proper choice only if (1) the findings of fact from which the district court failed to discern special circumstances are clearly erroneous, or (2) the failure to discern special circumstances from the facts found is an abuse of discretion as a matter of law. Since the facts are not contested, here appellants must show that special circumstances did exist on the facts found and that such special circumstances are sufficiently compelling to dictate the choice of the mixed plan.

[8–10] For purposes of this case, we need not delimit precisely how compelling such a showing of special circumstances must be in order to preclude the district court from exercising its discretion to choose an all-single-member plan. We decide only that no sufficient showing of special circumstances has been made to justify such a holding here. Appellants argue only that the mixed plan will provide substantial political participation to both blacks and whites and that since voting strength is almost

equally divided between the black and white population this balance constitutes a "special circumstance." The first consideration hardly suffices to dislodge the preference accorded single-member districting. That an at-large plan affords minorities greater political access is a necessary though perhaps not sufficient condition for holding that a district court cannot choose single-member districting. The second argument is equally meritless. Blacks constituted a majority of the population of East Carroll Parish, 11/ but the Supreme Court did not even pause to consider that fact in finding that there were no special circumstances. The balance of voting strength is not of independent importance in showing "special circumstances," but many relevant insofar as it demonstrates that an at-large of mixed plan might afford minorities greater political access or that a single-member plan is constitutionally defective. No such showing is made here.

There is no reason to think the district court should have found "special circumstance" that would override the general preference for single-member districting. There is no indication that the at-large provision would better serve the values of equal representation and access to the political process— indeed, the findings of the district court suggest precisely the contrary. Because any showing of "special circumstance" would gain persuasive force only by appeal to such values, we cannot say that the district court abused its discretion in choosing the single-member plan.

II. Attorneys' Fees

[11] The district court awarded attorneys' fees to plaintiffs

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11/ In East Carroll Parish, as of October 1971, there were 3,342 whites and 777 blacks registered on the East Carroll rolls and an additional 2,122 federally registered black voters in the parish. *Zimmer, supra*, 485 F.2d at 1301.

on the basis of the "common benefit" and "private attorney general" rationales. We found the common benefit rationale inapposite 12/ and the private attorney general rationale precluded by *Alyeska Pipeline Service Company v. Wilderness Society*, 1975, 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141. In *Alyeska*, the Supreme Court held that the private attorney general rule cannot support the award of attorneys' fees in federal cases in the absence of a statutory mandate. At the time of the district court's decision, although its use of the private attorney general rationale comported with the then-prevailing rule in this circuit, 13/ there was no statutory mandate. After *Alyeska*, however, Congress amended the Voting Rights Act to permit a court in its discretion to award attorneys' fees to the prevailing party in any action or proceeding to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments. 42 U.S.C. § 1973*l*(e). 14/ The question

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12/ We found the common "benefit" or "fund" rationale of *Mills v. Electric Auto-Lite Company*, 1970, 396 U.S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593, inapposite because there was neither a fund created by the litigation nor any indication that an award of attorneys' fees against the Board of Alderman would spread the costs of litigation proportionately among the members of the benefited class. *Wallace v. House, supra*, 515 F. 2d at 636.

13/ *See, e.g., Fairley v. Patterson*, 5 Cir. 1974, 493 F. 2d 598; *Lee v. Southern Homesites Corp.*, 5 Cir. 1971, 444 F. 2d 143. *Alyeska* specifically disapproved our *Fairley* and *Lee* decisions, 421 U.S. at 270, 95 S. Ct. at 1628 n. 146.

14/ 42 U.S.C. § 1973*l*(e) provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth and fifteenth Amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This provision was passed in reaction to *Alyeska*. *See* S. Rep. 94-295, 94th Cong., 1st Sess. 39-43, 1975 U.S. Code Cong. & Admin. News 806-810.

is thus whether the statute may be applied retroactively to a case on appeal at the time of its enactment. 15/ We hold that § 1973*l*(e) should be applied retroactively to allow the award of attorneys' fees in the present case.

This issue is squarely controlled by our decision in *Ferguson v. Winn Parish Police Jury*, 5 Cir. 1976, 528 F. 2d 592, 599 n. 13. 16/. We held in that case that § 1973*l*(e) should be applied retroactively to allow the award of attorneys' fees while the issue of fees was on appeal. In *Ferguson*, as in this case, the district court's award of attorneys' fees antedated enactment of the statutory authorization.

[12] The appropriate test for the retroactive application of

15/ The legislative history of the amendment does not indicate clearly whether the attorney's fee provision was intended to have retroactive affect. The Senate Report, note 14 *supra*, observes:

> Before May 12, 1975, when the Supreme Court handed down its decision in *Alyeska* . . . many lower Federal courts followed these Congressional policies and exercised their traditional equity powers to award attorneys fees under earlier civil rights laws as well.
>
> These pre-Alyeska decisions reme[dy] a gap in the specific statutory provisions and restored an important historic remedy for civil rights violations. However, in *Alyeska*, the Supreme Court held that the federal courts did not have the power to grant fees to "private attorneys general," or private enforcers of civil rights laws, exept under statutes whose language specifically authorizes such fee awards.
>
> The *Alyeska* decision created an unexpected and anomalous gap in our civil rights laws whereby awards or fees are barred in the most fundamental civil rights cases.
>
> . . .
>
> Section 403, like section 402, provides the specific statutory authorization required by the court in *Alyeska*.

16/ *See also Nevett v. Sides*, 5 Cir. 1976, 533 F. 2d 1361, 1365 n. 5; *Hall v. Issaquena County Bd. of Supervisors*, 5 Cir. 1976, 526 F. 2d 711, 712.

amendments permitting awards of attorneys' fees in cases pending on appeal was articulated by the Supreme Court in *Bradley v. School Board of City of Richmond*, 1974, 416 U.S. 696, 94 S. Ct. 2006, 40 L. Ed. 2d 476. 17/ Bradley directs courts to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. *Bradley, supra*, 416 U.S. at 711, 94 S. Ct. at 2016. 18/

Neither the statute nor its legislative history need give us pause in retroactively applying § 1973*l*(e). 19/ Nor can it be argued that retroactive application results in "manifest injustice" by unfairly escalating the substantive obligations of

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17/ In *Bradley*, plaintiffs had prevailed in their suit under 42 U.S.C. § 1983, to desegregate the public schools of Richmond, Virginia, and were awarded attorneys' fees on May 26, 1971. On July 1, 1972, Congress enacted section 718 of Title VII of the Emergency School Aid Act, which granted authority to a federal court to award a reasonable attorneys' fee when appropriate in a school desegregation case. 20 U.S.C. § 1617. Upon appeal of the award of attorneys' fees, the Fourth Circuit Court of Appeals reversed, holding that the absence of any explicit statutory authority at the time the suit was initiated precluded the award of attorneys' fees. The Supreme Court affirmed the district court, however, holding that absent statutory direction to the contrary, a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice. *Bradley, supra*, at 711, 94 S. Ct. at 2016.

18/ Relying on Chief Justice Marshall's holding in *United States v. Schooner Peggy*, 1801, 5 U.S. (1 Cranch.) 103, 2 L. Ed. 49, the court expressly rejected the notion that "a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Bradley, supra*, 416 U.S. at 715, 94 S. Ct. at 2018.

19/ *See* note 15, *supra*.

the defendant. 20/ At the time this action was commenced and until well after the district court's decision, the prevailing rule in this circuit was to allow awards of attorneys' fees under the private attorney general rationale. Retroactive application of § 1973*l*(e) represents merely an unexpected alternative rationale for the district court's award, which was otherwise entirely consistent with the reasonable expectations of the parties.

"One man, one vote" postulates an equivalence not easily achieved. Without the awarding of attorneys' fees, the concept could neither have emerged nor matured. The statute was passed to remove the infirmities of *Alyeska*. If retroactivity is a therapy, it should be applied.

The judgment of the district court is AFFIRMED.

20/ *See Latham v. Chandler*, N.D. Miss. 1976, 406 F. Supp. 754, 755-56 (no "manifest injustice" in exercising discretion to allow award of attorneys' fees for services rendered before enactment of § 1973*l*(e) despite initial refusal to grant attorneys' fees at time of preliminary hearing); *Torres v. Sachs*, S.D.N.Y. 1975, 69 F.R.D. 343, 344-45 (no "manifest injustice" to award attorneys' fees where voters successfully challenged city's procedure of conducting elections in English and cases were still pending when section 1973*l*(e) was adopted).

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

TEL 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

October 15, 1976

RECEIVED
NORMAN MAGEE'S OFFICE
Date 10-18-76

TO ALL COUNSEL OF RECORD

NO. 74-2654 - George Wallace, Sr., ET AL. v. J. P. House, etc., ET Al.; L. W. Davis, etc., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. Norman Magee
Mr. Paul H. Kidd
Mr. Stanley A. Halpin

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504-589-6514

October 26, 1976

Mr. Robert H. Shemwell, Clerk
U.S. District Court
P.O. Box 106
Shreveport, LA 71161

RECEIVED
NORMAN MAGEE'S OFFICE
Date 10-28-76

No. 74-2654 - George Wallace, Sr., Et Al v. J. P. House, Etc., Et Al; L. W. Davis, Etc., Et Al

(District Court No. CA17,971)

Dear Sir:

( ) Enclosed is a certified copy of the judgment of this Court on remand from the Supreme Court in the above case issued as and for the mandate.

( ) Enclosed is a certified copy of the Rule 21 Decision in the above case issued as and for the mandate.

( ) Having received from the Clerk of the Supreme Court a copy of the order of that court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

( ) We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause. This court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

( ) Copy of the Court's opinion.
(Vol. 1 Returned 10/22/75)

( ) Original record on appeal or review.
(Vol. 2 Returned 10/21/75)

( ) Original exhibits. (Exhibits Returned 10/21/75)

( ) Bill of Costs approved by this Court.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Mary Beth Breaux
Deputy Clerk

enc. (LETTER ONLY)
cc: Mr. Norman Magee
Mr. Paul H. Kidd
Mr. Stanley A. Halpin

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

FILED: November 1, 1976

GEORGE WALLACE SR., et al., :
Plaintiffs,
: CIVIL ACTION
vs. NO. 17,971
:
J. P. HOUSE, et al., :
Defendants.

RECEIVED
NORMAN MAGEE'S OFFICE
Date 11-2-76

ORDER

In compliance with the mandate of the United States Court of Appeals for the Fifth Circuit issued October 26, 1976, affirming the Judgment and Order of this Court issued June 6, 1974,

IT IS HEREBY ORDERED that Defendants herein forthwith comply with this Court's Order of June 6, 1974 and conduct elections for the Ferriday Board of Alderman pursuant to the 5 member single-member district plan approved by that Order, in accordance with the following schedule:

December 1-6, 1976 Qualification period
January 8, 1977 Primary election
January 29, 1977 Run-off general election

IT IS FURTHER ORDERED that all local and state election

officials and party officials take whatever steps as may be necessary to effectuate the Order of this Court.

IT IS FURTHER ORDERED that Defendants shall forthwith comply with the June 6, 1974 Order of this Court by paying the amount of attorney's fees and other special costs awarded therein, together with 7% per annum judicial interest on those amounts.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 1st day of November, 1976.

/s/ (illegible)
SENIOR UNITED STATES DISTRICT JUDGE

CERTIFICATE

I hereby certify that a copy of the foregoing Motion for Compliance with Mandate and Proposed Order were mailed, postage pre-paid, to Norman Magee, Magee Building, 1007 North Fourth Street, Ferriday, Louisiana, this 29th day of October, 1976.

/s/ Stanley A. Halpin, Jr.
STANLEY A. HALPIN, JR.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130

November 9, 1976

Mr. Norman Magee
Attorney at Law
Magee Building
1007 North Fourth Street
Ferriday, Louisiana 71334

RECEIVED
NORMAN MAGEE'S OFFICE
Date 11-11-76

No. 74-2564 - George Wallace, Sr., Et Al vs. J. P. House, Etc., Et Al; L. W. Davis, Etc., Et Al

(1) Appellants' motion to recall and stay the mandate.

(2) *November 16, 1976.

Dear Sir:

I am authorized by this Court to advise that the above (1) has been received and filed, and under the rules and practice of this Court will be presented for ruling without oral argument on the date* shown in column (2) above, together with any response or opposition that may be filed by opposing counsel by that date.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Linda Johnson
Deputy Clerk

cc: Mr. Stanley A. Halpin

* This is only the date on which it is now expected that the matter will be forwarded for ruling and does not mean that this office will be able to advise counsel of the Court's action by then. Counsel should allow at least ten days' time thereafter for advice as to the Court's ruling before making inquiry.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2654

GEORGE WALLACE, SR., ETALS
PLAINTIFFS-APPELLEES

VS

J. P. HOUSE, ETAL
DEFENDANTS-APPELLANTS

MOTION TO RECALL AND STAY MANDATE

The appellants above named respectfully moves this Honorable Court to recall and stay the mandate in the above entitled action and not permit the same to be issued out of said cause until further orders of this Court on the grounds and for the reasons that the Order of the United States District Court for the Western District of Louisiana, Monroe Division, (a copy attached hereto and made a part hereof), calls for the election process to begin on December 1, 1976; that appellants expect and intend, in good faith, with the time allowed by law, to apply to the Supreme Court of the United States of America by petition for a review on Writs of Certiorari of the decision and judgment rendered in favor of appellees and against appellants in the above entitled action; that the election may be completed before a judgment could be rendered by the Supreme Court; that a favorable judgment on behalf of the appellants could

render that election null and void.

WHEREFORE, appellants pray that the Court make and enter an appropriate order herein recalling ans staying the issuance of the mandate in the above entitled action until the further orders of the Court.

/s/ Norman Magee

NORMAN MAGEE
Attorney at Law
Magee Building
1007 North Fourth Street
Ferriday, Louisiana, 71334

Telephone: 318-757-4771

STATE OF LOUISIANA

AFFIDAVIT

PARISH OF CONCORDIA

BEFORE ME, the undersigned authority, personally came and appeared, NORMAN MAGEE, who being duly sworn, did depose and say:

1) That he is the attorney of record for defendants-appellants, in the above entitled action;

2) That he has served a copy of the above and foregoing Motion upon plaintiffs-appellees, by mailing a copy to plaintiffs-appellees' attorneys of record, Mr. Jack Grenberg, Mr. Eric Schanpper, Mr. Paul Henry Kidd, Mr. Stephen J. Katz and Mr. Stanley A. Halpin, Jr., by first class postage prepaid, this day by mailing same to Mr. Stanley A. Halpin, Jr., 344 Camp Street, New Orleans, Louisiana, 70130; and

3) That said copies were deposited in the U.S. Postoffice at Ferriday, Louisiana, on the 4th day of November, 1976.

/s/ Norman Magee
NORMAN MAGEE

SWORN TO AND SUBSCRIBED before me, Notary, this 4th day of November, 1976.

/s/ (illegible)
NOTARY PUBLIC

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-2654

GEORGE WALLACE, SR., ET AL.,
PLAINTIFFS-APPELLEES

VS

J. P. HOUSE, ET AL
DEFENDANTS-APPELLANTS

ORDER OF RECALL AND STAY OF MANDATE

This cause came on to be heard on the Motion of Defendants-Appellants for a Recall and Stay of Mandate herein.

ON CONSIDERATION WHEREOF, it is hereby ordered that the Mandate of this Court, issued October 26, 1976, in the above entitled action, be recalled and that no Mandate of this Court issue herein for a period of Thirty (30) days from this date, and that, if within the period of Thirty (30) days there is filed with the Clerk of the Supreme Court of the United States, a Petition for Writs of Certiorari, record and brief, with proof of service thereof under Section Three (3) of Rule Thirty Three (33) of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

This _____ day of _____, 1976.

JUDGE

EDGAR D. WHITCOMB, Governor of the State of Indiana, Appellant,

v

PATRICK CHAVIS et al.

— US —, 29 L Ed 2d 563, 91 S Ct —

[No. 92]

Argued December 8, 1970. Decided June 7, 1971.

SUMMARY

In a suit in a 3-judge United States District Court for the Southern District of Indiana, attacking Indiana's state legislative apportionment insofar as it created a single district of Marion County for the at-large election of eight state senators and 15 state assemblymen, the court, after withholding judgment for 2 months to allow the state legislature to correct the malapportionment according to the principles enumerated by the court, (1) redistricted Marion County into single-member districts on the ground that the multimember Marion County district illegally minimized and canceled out the voting power of the cognizable racial minority in the Marion County ghetto, as evidenced by fewer legislators' having resided in the ghetto than the ghetto's proportion of the County population; and (2) redistricted the entire state into single-member districts on the ground that the state was malapportioned by population-per-senator variations of 80,496 to 106,790 and population-per-assemblyman variations of 41,449 to 53,003 (307 F Supp 1362).

On appeal, the United States Supreme Court reversed.

WHITE, J., announced the court's judgment, and in Parts I-VI of his opinion, expressing the view of five members of the court, held that evidence of the ghetto's having fewer resident legislators than its proportion of the county population did not prove invidious discrimination against ghetto residents. In Part VII of his opinion, WHITE, J., joined by BURGER, Ch. J., BLACK and BLACKMUN, JJ., held that the District Court properly ordered statewide reapportionment. DOUGLAS, J., joined by BRENNAN and MARSHALL, JJ., while dissenting from the court's judgment, were in accord with the views expressed in Part VII of the opinion of WHITE, J.

STEWART, J., dissented from Part VII of the court's opinion on the ground that a state legislative apportionment scheme is constitutional if it is rational in the light of the state's own characteristics and needs, and not such as to permit the systematic frustration of the majority's will.

HARLAN, J., filed a separate opinion declaring that he would reverse and remand with directions to dismiss the complaint on the ground that the federal courts cannot restructure state electoral processes.

DOUGLAS, J., joined by BRENNAN and MARSHALL, JJ., dissented on the grounds that multimember legislative districts are unconstitutional where there are invidious effects, and that invidious effects had been proved in this case.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated

Appeal and Error § 327 – appellate jurisdiction

1. The Supreme Court lacks jurisdiction of and accordingly must dismiss an appeal following a 3-judge District Court's opinion where, at the time the appeal was taken, no judgment

had been entered and no injunction had been granted or denied.

Appeal and Error § 1660 – mootness

2. An appeal from a federal court decree enjoining state officials from conducting any elections under existing apportionment statutes, ordering that 1970 elections be held in accordance with the court's plan, and retaining jurisdiction to pass on any future claims of unconstitutionality with respect to any future legislative apportionments adopted by the state is not rendered moot by the holding of the 1970 elections and the adoption of new apportionment legislation, not only because of the court's retention of jurisdiction to pass on the legality of new apportionment legislation in view of its decision, but also because state court invalidation of the new legislation would require reexamination of the same issues.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

25 AM JUR 2d, Elections § 25

9 AM JUR PL & PR FORMS (Rev ed), Elections, Forms 7, 8, 10

US L ED DIGEST, Constitutional Law § 334; Legislature § 6

ALR DIGESTS, Elections §§ 103, 104

L ED INDEX TO ANNO, Constitutional Law; Legislature; One Man-One Vote

ALR QUICK INDEX, Elections

FEDERAL QUICK INDEX, Elections; One Man-One Vote Rule

ANNOTATION REFERENCES

To what governmental agencies, units, officers, or subdivisions of a state, other than the state legislature, is the "one man-one vote" rule applicable. 18 L Ed 2d 1537.

Race discrimination. 94 L Ed 1121, 96 L Ed 1291, 98 L Ed 882, 100 L Ed 488, 3 L Ed 2d 1556, 6 L Ed 2d 1302, 10 L Ed 2d 1105, 15 L Ed 2d 990, 21 L Ed 2d 915.

Inequalities in population of election districts or voting units as rendering apportionment unconstitutional. 12 L Ed 2d 1282.

Constitutionality and construction of statutes providing for proportional representation or other system of preferential voting in public elections. 110 ALR 1521, 123 ALR 252.

Citizenship § 2 – legislative bodies – participation

3. Each and every citizen has an inalienable right to full and effective participation in the political processes of his state's legislative bodies.

Elections § 3 – legislature – equality of votes

4. The Federal Constitution demands that each citizen have an equally effective voice in the election of members of his state legislature.

Constitutional Law § 334 – malapportionment

5. Apportionment schemes which give the same number of representatives to unequal numbers of constituents unconstitutionally dilute the value of the votes in the larger districts.

Constitutional Law § 334 – apportionment

6. The equal protection clause requires that the seats in both houses of bicameral state legislature be apportioned substantially on a population basis.

Constitutional Law § 334 – multimember districts

7. A multimember electoral district is not per se illegal under the equal protection clause.

Courts § 236.5 – justiciable issues

8. The vaiidity of multimember electoral district systems is a justiciable issue.

Constitutional Law § 334 – multimember districts

9. Multimember electoral district systems may be subject to challenge where the circumstances of the particular case may operate to minimize or cancel out the voting strength of racial or political elements of the voting population, especially where the district is large and elects substantial proportion of the seats in either house of a bicameral legislature, or where it is multimembered for both houses of the legislature, or where it lacks provision for at-large candidates running from particular geographical subdistricts.

Evidence § 101 – burden of proof – invalidity of statute

10. The challenger carries the burden of proving that multimember districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements.

Evidence § 904.3 – invalidity of multimember districts

11. A mathematical analysis of the voting power of residents of multimember districts, on the hypothesis that the true test of voting power is the ability to cast tie-breaking votes, but theoretical and omitting any political or other factors which might affect the residents' actual voting power, such as party affiliation, race, previous voting characteristics, or any other factors which enter into the entire political voting situation, does not sufficiently demonstrate the real-life impact of multimember districts on individual voting power to warrant holding such districts to be constitutionally impermissible.

Constitutional Law § 334 – multimember districts

12. Even if the legislative delegation from a multimember district tends to bloc-voting, a multimember district does not overrepresent its voters, as compared with voters in single-

member districts, so as to be constitutionally impermissible.

Civil Rights § 2 – constitutional amendments

13. The Civil War Amendments of the Constitution were designed to protect the civil rights of Negroes.

Evidence § 904.3 – discrimination

14. Absent evidence and findings that ghetto residents had less opportunity than other residents of a multimember legislative district to participate in the political processes and to elect legislators of their choice, invidious discrimination against them is not shown by the fact that the ghetto has fewer legislators residing therein than its proportion of the district population.

Constitutional Law § 334– multimember districts

15. That one interest group or another concerned with the outcome of elections in a multimember legislative district has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where there is no indication that this segment of the population is being denied access to the political system.

Constitutional Law § 334 – multimember districts

16. District-based elections decided by plurality vote are not unconstitutional in either single-member or multimember legislative districts simply because the supporters of losing candidates have no legislative seats assigned to them.

Courts § 7 – powers

17. The remedial powers of an equity court must be adequate to the task, but they are not unlimited.

Legislature § 6 – malapportionment – remedy

18. A United States District Court errs in disestablishing an entire countywide multimember legislative district and creating single-member districts therein in contravention of state appor-

tionment policy, manifested by a state constitutional provision forbidding the division of any county for senatorial apportionment, and without expressly putting aside on supportable grounds the alternatives of (1) creating single-member districts in the county's ghetto and leaving the district otherwise intact or (2) requiring that some at-large candidates each year reside in the ghetto.

Legislature § 6 – malapportionment – release

19. A United States District Court properly orders statewide legislative redistricting where one district had 80,496 residents for one senator while another district had 106,790 residents for one senator, one district had 41,449 residents for one representative while another district had 53,003 residents for one representative, and the court refrained from action until the state legislature ignored the court's findings and suggestion that it call a special session for the purpose of redistricting. [Per White, J., Burger, Ch. J., Black, and Blackmun, JJ. Accord, Douglas, Brennan, and Marshall, JJ.]

Legislature § 6 – malapportionment – relief

20. In reapportioning a state's legislative districts, a United States District Court acts properly in dividing some counties into several districts, notwithstanding a state constitutional provision that no county shall ever be divided for senatorial apportionment, where none of the statewide redistricting plans submitted for the court's consideration follw the state constitution in this respect, and where the court strives to preserve the integrity of county and township lines wherever possible, although it ultimately concludes that the difficulty of devising compact and contiguous districts within a framework of mathematical equality largely precludes preservation of county lines. [Per White, J., Burger, Ch. J., Black, and Blackmun, JJ. Accord, Douglas, Brennan, and Marshall, JJ.]

Courts § 775 – adherence to former decision

21. A 1965 decision of the United States District Court, upholding a state's legislative apportionment under the "substantial equality" test of Reynolds v Sims (1964) 377 US 533, 12 L Ed 2d 506, 84 S Ct 1362, does not render the legislative apportionment beyond attack, on the grounds that disparities among districts thought to be permissible at the time of the Reynolds Case have been shown by intervening Supreme Court decisions to be excessive. [Per White, J., Burger, Ch. J., Black, and Blackmun, JJ. Accord, Douglas, Brennan, and Marshall, JJ.]

WHITCOMB v CHAVIS
29 L Ed 2d 363
APPEARANCES OF COUNSEL

William F. Thompson argued the cause for appellant.
James Manahan argued the cause for appellee.

OPINION OF THE COURT

Mr. Justice White delivered the opinion of the Court with respect to the validity of the multi-member election district in Marion County, Indiana (Parts I-VI), together with an opinion (Part VII), in which The Chief Justice, Mr. Justice Black, and Mr. Justice Blackmun joined, on the propriety of ordering redistricting of the entire State of Indiana, and announced the judgment of the Court.

We have before us in this case the validity under the Equal Protection Clause of the statutes districting and apportioning the State of Indiana for its general assembly elections. The principal issue centers on those provisions constituting Marion County , which includes the city of Indianapolis, a multi-member district for electing state senators and representatives.

I

Indiana has a bicameral general assembly consisting of a house of representatives of 100 members and a senate of 50 members. Eight of the 31 senatorial districts and 25 of the 39 house districts are multi-member districts, that is, districts which are represented by two or more legislators elected at large by the voters of the district. 1/ Under the statutes here

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1/ As later indicated, shortly before announcement of this opinion, the Court was informed that the statutes at issue here will soon be superseded by new apportionment legislation recently adopted by the Indiana Legisla-

challenged, Marion County is a multi-member district electing eight senators and 15 members of the house.

On January 9, 1969, six residents of Indiana, five of whom were residents of Marion County, filed a suit described by them as "attacking the constitutionality of two statutes of the State of Indiana which provide for multi-member districting at large of General Assembly seats in Marion County, Indiana . . . . " 2/ Plaintiffs 3/ Chavis, Ramsey, and Bryant alleged that the two statutes invidiously diluted the force and effect of the vote of Negroes and poor persons living within certain Marion County

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1/ (Continued) ture and signed by the governor. That legislation provides for single-member districts throughout the State including Marion County. For the reasons stated below the controversy is not moot, and as will be evident, this opinion proceeds as though the state statutes before us remain undisturbed by new legislation.

2/ The provisions attacked, contained in Acts 1965 (2d Spec. Sess.) c. 5, § 3, and c. 4, § 3, and appearing in Burns' (1969 Repl.), § § 34-102 and 34-104 were as follows:

"34-102. *Apportionment of representatives.*—Representatives shall be elected from districts comprised of one (1) or more counties and having one (1) or more representatives as follows: . . . Twenty Sixth District Marion County: fifteen (15) representatives . . . .

"34-104. *Apportionment of senators.*—Senators shall be elected from districts, comprised of one or more counties and having one or more senators, as follows: . . . Nineteenth District—Marion County: eight (8) senators, two (2) to be elected in 1966.

. . . . .

The District Court denied plaintiffs' motion to have the suit declared a class action under Fed Rule Civ Proc 23(b). Chavis v. Whitcomb, 305 F Supp 1359, 1363 (SD Ind 1969). See n. 17, infra.

3/ Plaintiffs in the trial court are appellees here and defendants are appellants. We shall refer to the parties in this opinion as they stood in the trial court.

census tracts constituting what was termed "the ghetto area." Residents of the area were alleged to have particular demographic characteristics rendering them cognizable as a minority interest group with distinctive interests in specific areas of the substantive law. With single-member districting, it was said, the ghetto area would elect three members of the house and one senator, whereas under the present districting voters in the area "have almost no political force or control over legislators because the effect of their vote is cancelled out by other contrary interest groups" in Marion County. The mechanism of political party organization and the influence of party chairmen in nominating candidates were additional factors alleged to frustrate the exercise of power by residents of the ghetto area.

Plaintiff Walker, a Negro resident of Lake County, also a multi-member district but a smaller one, alleged an invidious discrimination against Lake County Negroes because Marion County Negroes, although no greater in number than Lake County Negroes, had the opportunity to influence the election of more legislators than Lake County Negroes. 4/ The claim was that Marion County was one-third larger in population and thus had approximately one-third more assembly seats than Lake County, but that voter influence does not vary inversely with population and that permitting Marion County voters to elect 23 assemblymen at large gave them a disproportionate advantage over voters in Lake County. 5/ The two

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4/ Walker also alleged that "in both Lake and Marion County, Indiana there are a sufficient number of negro [sic] voters and inhabitants for a bloc vote by the said inhabitants to change the result of any election recently held."

5/ The mathematical basis for the assertion was set out in detail in the complaint. See also n. 23, infra. It was also alleged that "[b]oth Marion County . . . and Lake County . . . are the sole matter for consideration

remaining plaintiffs presented claims not at issue here. 6/

A three-judge court convened and tried the case on June 17 and 18, 1969. Both documentary evidence and oral testimony were taken concerning the composition and characteristics of the alleged ghetto area, the manner in which legislative candidates were chosen and their residence and tenure, and the performance of Marion County's delegation in the Indiana general assembly. 7/

5/ (Continued) before two separate state legislative committees, one directed to the affairs of each county. The laws enacted . . . which directly effect [sic] Marion or Lake County typically apply to only one county or the other." App. 15.

6/ Plaintiff Marilyn Hotz, a Republican and a resident of what she described as the white suburban belt of Marion County lying outside the city of Indianapolis, alleged that malapportionment of precincts in party organization together with multi-member districting invidiously diluted her vote.

Plaintiff Rowland Allan (spelled "Allen" in the District Court's opinion), an independent voter, alleged that multi-member districting deprived him of any chance to make meaningful judgments on the merits of individual candidates because he was confronted with a list of 23 candidates of each party.

7/ In their final arguments and proposed findings of fact and conclusions of law plaintiffs urged that the Center Township ghetto was largely inhabited by Negroes who had distinctive interests and whose bloc voting potential was canceled out by opposing interest groups in the at-large elections held in Marion County's multi-member district, that the few Negro legislators, including the three then serving the general assembly from Marion County, were chosen by white voters and were unrepresentative of ghetto Negroes, and that Negroes should be given the power and opportunity to choose their own assemblymen. It was also urged that the power of political as well as racial elements was canceled out in that in every assembly election since 1922, one party or the other had won all the seats with two minor exceptions; hence many voters, in numbers large

The three-judge court filed its opinion containing its findings and conclusions on July 28, 1969, holding for plaintiffs. Chavis v. Whitcomb, 305 F Supp 1364 (SD Ind 1969). See also 305 F Supp 1359 (1969) (pre-trial orders) and 307 F Supp 1362 (1969) (statewide reapportionment plan and implementing order). In sum, it concluded that Marion County's multi-member district must be disestablished and, because of population disparities not directly related to the phenomena alleged in the complaint, the entire State must be redistricted. More particularly, it first determined that a racial minority group inhabited an identifiable ghetto area in Indianapolis. 8/ That area, located in the northern half of Center Township and termed the "Center Township ghetto," comprised 28 contiguous census tracts and parts of four others. 9/ The area contained a 1967 population of 97,000 nonwhites, over 99% of whom were Negro, and 35,000 whites. The court proceeded to compare six of these tracts, representative of the area, with tract 211, a predominantly white, relatively wealthy suburban census tract in Washington Township contiguous to the northwest corner of the court's ghetto area and with tract 220, also in Washington Township, a contiguous tract inhabited by middle class Negroes. Strong differences were found in terms of housing conditions, income and educational levels, rates of unemployment, juvenile crime and welfare assistance. The constrasting characteristics between the court's ghetto area and its inhabitants on the one hand and tracts 211 and 220 on the other indicated the ghetto's "compelling interests in such legislative areas as urban renewal and rehabilitation, health care, employment training and opportunities, welfare, and relief of the poor, law enforcement, quality of education, and anti-discrimination measures." 305 F Supp, at 1380. These interests were in addition to those the ghetto shared with the rest of the

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7/ (Continued) enough and geographically so located as to command control over one or more general assembly seats if Marion County were subdistricted, were wholly without representation whichever way an assembly election turned out.

The defendants argued that Marion County's problems were county-wide and that its delegation could better represent the various interests in the county if elected at large and responsible to the county as a whole rather than being elected in single-member districts and thus fragmented by parochial interests and jealousies. They also urged that the 1960 census figures were an unreliable basis for redistricting Marion County and opposed the court's suggestion that the apportionment of the whole State was an issue properly before the court on the pleadings and the evidence.

8/ A ghetto was defined as a residential area with a higher density of population and greater proportion of substandard housing than in the overall metropolitan area and inhabited primarily by racial or other minority groups with lower than average socioeconomic status and whose residence in the area is often the result of a social legal or enconomic restriction or custom. 305 F Supp, at 1373.

9/ The court's ghetto area was no congruent with that alleged in the complaint. It included five census tracts and parts of four others not within the ghetto area alleged in the complaint, but it omitted census tract 220 which the complaint had included. 305 F Supp, at 1379-1381. That district, which was contiguous to both tract 211 and the ghetto area, was inhabited primarily by Negroes but was found to be a middle class district differing substantially in critical elements from the remainder of the ghetto. The court also made it unmistakably clear that its ghetto area "does not represent the entire ghettorized portion of Center Township but only the portion which is predominantly inhabited by Negroes and which was alleged in the complaint." 305 F Supp, at 1380-1381. Although census tract 563, a tract "randomly selected to typify tracts . . . within the predominantly white ghetto portion of Center Township," id., at 1374, was shown to have characteristics very similar to the tracts in the court's ghetto area except for the race of its inhabitants, the size and configuration of the white ghetto area were not revealed by the findings.

county, such as metropolitan transportation, flood control, sewage disposal, and education.

The court then turned to evidence showing the residences of Marion County's representatives and senators in each of the five general assemblies elected during the period 1960 through 1968. 10/ Excluding tract 220, the middle class Negro district, Washington Township, the relatively wealthy suburban area in which tract 211 was located, with an average of 13.98% of Marion County's population, was the residence of 47.52% of its senators and 34.33% of its representatives. The court's Center Township ghetto area, with 17.8% of the population, had 4.75% of the senators and 5.97% of the representatives. The nonghetto area of Center Township, with 23.32% of the population, had done little better. Also, tract 220 alone, the middle class Negro district, had only .66% of the county's population but had been the residence of more representatives than had the ghetto area. The ghetto area had been represented in the senate only once—in 1964 by one senator—and the house three times—with one representative in 1962 and 1964 and by two representatives in the 1968 general assembly. The court found the "Negro Center Township population" to be sufficiently large to elect two representatives and one senator if the ghetto tracts "were specific single member legislative districts" in Marion County. 305 F Supp, at 1385. From this data the court found gross inequity of representation, as determined by residence of legislators, between Washington Township and tract 220 on the one hand and Center Township and the Center Township ghetto area on the other.

The court also characterized Marion County's general assembly delegation as tending to coalesce and take common

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10/ See Appendix to opinion, p. —, 29 L Ed 2d p. 339.

positions on proposed legislation. This was "largely the result of election at large from a common constituency, and obviates representation of a substantial, though minority, interest group within that common constituency." Ibid. Related findings were that, as a rule, a candidate could not be elected in Marion County unless his party carried the election; 11/ county political

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11/ A striking but typical example of the importance of party affiliation and the "winner-take-all" effect is shown by the 1964 House of Representatives election.

Democrats	*Votes*
Neff	151,822
Bridwell	151,756
Murphy	151,746
Dean	151,702
Creedon	151,573
Jones	151,481
DeWitt	151,449
Logan	151,360
Roland	151,343
Walton	151,282
Huber	151,268
Costello	151,153
Fruits	151,079
Lloyd	150,862
Ricketts	150,797

Republicans	*Votes*
Cox	144,336
Hadley	144,235
Baker	144,032
Burke	143,989
Borst	143,972
Madinger	143,918
Clark	143,853
Bosma	143,810
Brown	143,744
Durnil	143,588
Gallagher	143,553

organizations had substantial influence on the selection and election of assembly candidates (an influence that would be diminished by single-member districting), as well as upon the actions of the county's delegation in the assembly; and that at large elections made it difficult for the conscientious voter to make a rational selection.

The court's conclusions of law on the merits may be summarized as follows:

1. There exists within Marion County an identifiable racial element, "the Negro residents of the Center Township ghetto," with special interests in various areas of substantive law, diverging significantly from interests of nonresidents of the ghetto.12/

11/ (Continued)

Republicans	*Votes*
Cope	143,475
Elder	143,436
Zerfas	143,413
Allen	143,369

Though nearly 300,000 Marion County voters cast nearly 4¼ million votes for the House, the high and low candidates within each party varied by only about a thousand votes. And, as these figures show, the Republicans lost every seat though they received 48.69% of the vote. Exhibit 10.

12/ "The first requirement implicit in Fortson v Dorsey and Burns v Richardson, that of an identifiable racial or political element within that multi-member district, is met by the Negro residents of the Center Township Ghetto. These Negro residents have interests in areas of substantive law such as housing regulations, sanitation, welfare programs (aid to families with dependent children, medical care, etc.), garnishment statutes, and unemployment compensation, among others, which diverge significantly from the interests of nonresidents of the Ghetto." 305 F Supp, at 1386.

2. The voting strength of this racial group has been minimized by Marion County's multi-member senate and house district because of the strong control exercised by political parties over the selection of candidates, the inability of the Negro voters to assure themselves the opportunity to vote for prospective legislators of their choice and the absence of any particular legislators who are accountable for their legislative record to Negro voters.

3. Party control of nominations, the inability of voters to know the candidate and the responsibility of legislators to their party and the county at large make it difficult for any legislator to diverge from the majority of his delegation and to be an effective representative of minority ghetto interests.

4. Although each legislator in Marion County is arguably responsible to all the voters, including those in the ghetto, "[p]artial responsiveness of all legislators is [not] . . . equal [to] total responsiveness and the informed concern of a few specific legislators."13/

5. The apportionment statutes of Indiana as they relate to Marion County operate to minimize and cancel out the voting strength of a minority racial group, namely Negroes residing in the Center Township ghetto, and to deprive them of the equal protection of the laws.

13/ Ibid. The District Court implicitly, if not expressly, rejected the testimony of defendants' witnesses, including a professor of political science, to the effect that Marion County's problems and all its voters would be better served by a delegation sitting and voting as a team and responsible to the district at large, than by a delegation elected from single-member districts and split into groups representing special interests.

6. As a legislative district, Marion County is large as compared with the total number of legislators, it is not subdistricted to insure distribution of the legislators over the county and comprises a multi-member district for both the house and the senate. (See Burns v. Richardson, 384 US 73, 88, 16 L Ed 2d 376, 388, 86 S Ct 1286 (1966).)

7. To redistrict Marion County alone would leave impermissible variations between Marion County districts and other districts in the State. Statewide redistricting was required, and it could not await the 1970 census figures estimated to be available within a year.

8. It may not be possible for the Indiana general assembly to comply with the state constitutional requirement prohibiting crossing or dividing counties for senatorial apportionment [14] and still meet the requirements of the Equal Protection Clause adumbrated in recent cases. [15]

9. Plaintiff Walker's claim as a Negro voter resident of Lake County that he was discriminated against because Lake County Negroes could vote for only 16 assemblymen while Marion County Negroes could vote for 23 was deemed untenable. In his second capacity, as a general voter in Lake County, Walker "probably has received less effective representation" than Marion County voters because "he votes for fewer legislators and, therefore, has fewer legislators to speak for him," and,

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[14] Article 4, § 6, of the Indiana Constitution provides:

"A Senatorial or Representative District, where more than one county shall constitute a district, shall be composed of contiguous counties; *and no county, for Senatorial apportionment, shall ever be divided.*" (Emphasis added.)

[15] See part VII, infra.

since in theory voting power in multi-member districts does not vary inversely to the number of voters, Marion County voters had greater opportunity to cast tie-breaking or "critical" votes. But the court declined to hold that the latter ground had been proven, absent more evidence concerning Lake County. [16] In this respect consideration of Walker's claim was limited to that to be given the uniform districting principle in reapportioning the Indiana general assembly. [17]

[1] Turning to the proper remedy, the court found redistricting of Marion County essential. Also, although recognizing the complaint was directed only to Marion County, the court thought it must act on the evidence indicating that the entire

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[16] "In his second status, we find that plaintiff Walker is a voter of Indiana who resides outside Marion County. Applying the uniform district principle, discussed infra in the remedy section, we find that he probably has received less effective representation than Marion County voters. It has been shown that he votes for fewer legislators and, therefore, has fewer legislators to speak for him. He also, theoretcially, casts fewer critical votes than Marion County voters, but we decline to so hold in the absence of sufficient evidence as to other factors such as bloc and party voting in Lake County. We hold that, in the absence of stronger evidence of dilution, his remedy is limited to the consideration which should be given to the uniform district principle in any subsequent reapportionment of the Indiana General Assembly." 305 F Supp, at 1390.

[17] The court found a failure of proof on behalf of plaintiff Hotz, a resident of the white suburban belt, and on behalf of plaintiff Allan, an independent voter. Two other plaintiffs were entitled to no relief, plaintiff Chavis because he resided outside the Center Township ghetto and plaintiff Ramsey because he failed to show that he was a resident of that area. Only plaintiff Mason Bryant, in addition to the qualified recognition given Walker, was found to have standing to sue and to be entitled to the relief prayed for.

State required reapportionment. 18/ Judgment was withheld in all respects, however, to give the State until October 1, 1969, to enact legislation remedying the improper districting and malapportionment found to exist by the court. 19/ In so doing the court thought the State "might wish to give consideration to certain principles of legislative apportionment brought out at the trial in these proceedings." Id., at 1391. First, the court eschewed any indication that Negroes living in the ghetto were entitled to any certain number of legislators—districts should be drawn with an eye that is color blind, but neither would sophisticated gerrymandering be countenanced. Second, the legislature was advised to keep in mind the theoretical advantage inhering in voters in multi-member districts, that is, their theoretical opportunity to cast more deciding votes in any legislative election. Referring to the testimony that bloc-voting, multi-member delegations have disproportionately more power than single-member districts, the court thought that "the testimony has application here." Also, "as each member of the bloc delegation is responsible to the voter majority who elected the whole, each Marion County voter has a greater voice in the legislature, having more legislators to speak for him than does a comparable voter" in a single-member district. Single-member districts, the court thought, would equalize voting power among the districts as well as avoiding diluting political or racial groups located in multi-member districts. The court therefore recommended that the general assembly give consideration to

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18/ See part VII, infra.

[1] 19/ The State appealed here following this opinion. Since at that time no judgment had been entered and no injunction had been granted or denied, we do not have jurisdiction of that appeal and it is therefore dismissed. Gunn v. University Committee, 399 US 383, 26 L Ed 2d 684, 90 S Ct 2013 (1970).

the uniform district principle in making its apportionment. 20/

On October 15, the court judicially noticed that the Indiana general assembly had not been called to redistrict and reapportion the State. Following further hearings and examination of various plans submitted by the parties, the court drafted and adopted a plan based on the 1960 census figures. With respect to Marion County, the court followed plaintiff's suggested scheme, which was said to protect "the legally cognizable racial minority group against dilution of its voting strength." Chavis v Whitcomb, 307 F Supp 1362, 1365 (SD Ind 1969). Single-member districts were employed throughout the State, county lines were crossed where necessary, judicial notice was taken of the location of the nonwhite population in establishing district lines in metropolitan areas of the State and the court's plan expressly aimed at giving "recognition to the cognizable racial minority group whose grievance lead [sic] to this litigation." Id., at 1366.

The court enjoined state officials from conducting any elections under the existing apportionment statutes and ordered that the 1970 elections be held in accordance with the plan prepared by the court. Jurisdiction was retained to pass upon any future claims of unconstitutionality with respect to any future legislative apportionments adopted by the State. 21/

20/ The trial court's discussion of this subject may be found in 305 F Supp, at 1391-1392.

21/ The Court also provided for the possibility that the legislature would fail to redistrict in time for the 1972 elections:

"The Indiana constitutional provision for staggering the terms of senators, so that one-half of the Senate terms expire every two years, is entirely proper and valid and would be mandatory in a legislatively devised redistricting plan.

Appeal was taken following the final judgment by the three-judge court, we noted jurisdiction, 397 US 984, 25 L Ed 2d 392, 90 S Ct 1112, 1113, 1125 (1970), and the State's motion for stay of judgment was granted pending our final action on this case, 396 US 1055, 24 L Ed 2d 757, 90 S Ct 748 (1970), thus permitting the 1970 elections to be held under the existing apportionment statutes declared unconstitutional by the District Court. On June 1, 1971, we were advised by the parties that the Indiana Legislature had passed, and the governor had signed, new apportionment legislation soon to become effective for the 1972 elections and that the new legislation provides for single-member house and senate districts throughout the State, including Marion County.

II

With the 1970 elections long past and the appearance of new legislation abolishing multi-member districts in Indiana, the issue of mootness emerges. Neither party deems the case mooted by recent events. Appellees, plaintiffs below, urge that if the appeal is dismissed as moot and the judgment of the District Court is vacated, as is our practice in such cases, there would be no outstanding judgment invalidating the Marion County multi-member district and that the new apportionment legislation would be in conflict with the state constitutional provision forbidding the division of Marion County for the purpose of electing senators. If the new senatorial districts were invalidated in the state courts in this respect, it is argued that the issue involved in the present litigation would simply reappear for decision. The attorney general for the State of Indiana, for the appellant, taking a somewhat different tack, urges that the issue of the Marion County multi-member district is not moot since the District Court has retained jurisdiction to pass on the legality of subsequent apportionment statutes for the purpose, among others, of determining whether the alleged discrimination against a cognizable minority group has been remedied, an issue that would not arise if the District Court erred in invalidating multi-member districts in Indiana.

[2] We agree that the case is not moot and that the central issues before us must be decided. We do not, however, pass upon the details of the plan adopted by the District Court, since that plan in any event would have required revision in light of the 1970 census figures.

III

[3-6] The line of cases from Gray v Sanders, 372 US 368, 9 L Ed 2d 821, 83 S Ct 801 (1963), and Reynolds v. Sims, 377 US 533, 12 L Ed 2d 506, 84 S Ct 1362 (1964), to Kirkpatrick v Preisler, 394 US 526, 22 L Ed 2d 519, 89 S Ct 1225 (1969), and Wells v. Rockefeller, 394 US 542, 22 L Ed 2d 535, 89 S Ct 1234 (1969), recognize that "representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." Reynolds v Sims, 377 US, at 565, 12 L Ed 2d at 529. Since most citizens find it possible to participate only as qualified voters in electing their

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21/ (Continued)

"However, the plan adopted herein is provisional in nature and probably will be applicable for only the 1970 election and the subsequent 2-year period. This is true since the 1970 census will have been completed in the interim and the legislature can very well redistrict itself prior to the 1972 election. On the other hand, it is conceivable that the legislature may fail to redistrict before the 1972 election. In such event, all fifty senatorial seats shall be up for election every two years until such time as the legislature properly redistricts itself. It will then properly be the province of the legislature in redistricting to determine which senatorial districts shall elect senators to 4-year terms and which shall elect senators to 2-year terms to reinstate the staggering of terms." 307 F Supp, at 1367.

representatives, "[f]ull and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature." Ibid. Hence, apportionment schemes "which give the same number of representatives to unequal numbers of constituents." 377 US, at 563, 12 L Ed 2d at 528, unconstitutionally dilute the value of the votes in the larger districts. And hence the requirement that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis." 377 US, at 568, 12 L Ed 2d at 531.

[7-10] The question of the constitutional validity of multi-member districts has been pressed in this Court since the first of the modern reapportionment cases. These questions have focused not on population-based apportionment but on the quality of representation afforded by the multi-member district as compared with single-member districts. In Lucas v General Assembly, 377 US 713, 12 L Ed 2d 632, 84 S Ct 1459 (1964), decided with Reynolds v Sims, we noted certain undesirable features of the multi-member district but expressly withheld any intimation "that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective." 377 US, at 731, n. 21, 12 L Ed 2d at 644. Subsequently, when the validity of the multi-member district, as such, was squarely presented, we held that such a district is not per se illegal under the Equal Protection Clause. Fortson v Dorsey, 379 US 433, 13 L Ed 2d 401, 85 S Ct 498 (1965); Burns v Richardson, 384 US 73, 16 L Ed 2d 376, 86 S Ct 1286 (1966); Kilgarlin v Hill, 386 US 120, 17 L Ed 2d 771, 87 S Ct 820 (1967). See also Burnette v Davis, 382 US 42, 15 L Ed 2d 35, 86 S Ct 181 (1965); Harrison v Schaefer, 383 US 269, 15 L Ed 2d 750, 86 S Ct 929 (1966).22/

22/ In Fortson, the Court reversed a three-judge District Court which found a violation of the Equal Protection Clause in that voters in single-member districts were allowed to "select their own senator" but that

That voters in multi-member districts vote for and are represented by more legislators than voters in single-member districts has so far not demonstrated an invidious discrimination against the latter. But we have deemed the validity of multi-member

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22/ (Continued) voters in multimember districts were not. The statutory scheme in Fortson provided for subdistricting within the county, so that subdistrict was the residence of exactly one senator. However, each senator was elected by the county at large. The Court said, "Each [sub]district's senator must be a resident of that [sub]district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home [sub]district; thus in fact he is the county's and not merely the [sub]district's senator." 379 US, at 438, 13 L Ed 2d at 404. The question of whether the scheme "operate[d] to minimize or cancel out the voting strength of racial or political elements of the voting population" was not presented.

In Burnette, we summarily affirmed a three-judge District Court ruling, 245 F Supp 241, which upheld a multi-member district consisting of the city of Richmond, Va., and suburban Henrico County over the objections of both urban Negroes and suburban whites. Since the urban Negroes did not appeal here, the affirmance is of no weight as to them, but as to the suburbanites it represents an adherence to Fortson. Similarly, Harrison summarily affirmed a District Court reapportionment plan, 251 F Supp 450, where multi-member districts in Wyoming were held necessary to keep county splitting at a minimum.

Burns vacated a three-judge court decree which required single-member districts except in extraordinary circumstances. The Court in Burns noted that "the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record." 384 US, at 88, 16 L Ed 2d at 389.

In Kilgarlin, the Court affirmed, per curiam, a district court ruling "insofar as it held that appellants had not proved their allegations that [the Texas House of Representatives reapportionment plan] was a racial or political gerrymander violating the Fourteenth Amendment, that it unconstitutionally deprived Negroes of their franchise and that because of its utilization of single member, multi-member and floterial districts it was an unconstitutional 'crazy quilt.' " 386 US, at 121, 17 L Ed 2d at 774.

district systems justiciable, recognizing also that they may be subject to challenge where the circumstances of a particular case may "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Fortson, 379 US, at 439, 13 L Ed 2d at 405, and Burns, 384 US, at 88, 16 L Ed 2d at 388. Such a tendency, we have said, is enhanced when the district is large and elects a substantial proportion of the seats in either house of a bicameral legislature, if it is multi-membered for both houses of the legislature or if it lacks provision for at-large candidates running from particular geographical subdistricts, as in Fortson. Burns, 384 US, at 88, 16 L Ed 2d at 388. But we have insisted that the challenger carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements. We have not yet sustained such an attack.

IV

Plaintiffs level two quite distinct challenges to the Marion County district. The first charge is that any multi-member district bestows on its voters several unconstitutional advantages over voters in single-member districts or smaller multi-member districts. The other allegation is that the Marion County district, on the record of this case, illegally minimizes and cancels out the voting power of a cognizable racial minority in Marion County. The District Court sustained the latter claim and considered the former sufficiently persuasive to be a substantial factor in prescribing uniform, single-member districts as the basic scheme of the court's own plan. See 307 F Supp, at 1366.

[11] In asserting discrimination against voters outside Marion County, plaintiffs recognize that Fortson, Burns, and Kilgarlin proceeded on the assumption that the dilution of voting power suffered by a voter who is placed in a district 10 times the

population of another is cured by allocating 10 legislators to the larger district instead of the one assigned to the smaller district. Plaintiffs challenge this assumption at both the voter and legislator level. They demonstrate mathematically that in theory voting power does not vary inversely with the size of the district and that to increase legislative seats in proportion to increased population gives undue voting power to the voter in the multi-member district since he has more chances to determine election outcomes than does the voter in the single-member district. This consequence obtains wholly aside from the quality or effectiveness of representation later furnished by the successful candidates. The District Court did not quarrel with plaintiffs' mathematics, nor do we. But like the District Court we note that the position remains a theoretical one 23/

23/ The mathematical backbone of this theory is as follows: In a population of *n* voters, where each voter has a choice between two alternatives (candidates), there are 2 possible voting combinations. For example, with a population of three voters, A, B, and C, and two candidates, X and Y, there are eight combinations:

	A	B	C
No. 1	X	X	X
No. 2	X	X	Y
No. 3	X	Y	X
No. 4	X	Y	Y
No. 5	Y	X	X
No. 6	Y	X	Y
No. 7	Y	Y	X
No. 8	Y	Y	Y

The theory htypothesizes that the true test of voting power is the ability to cast a tie-breaking, or "critical" vote. In the population of three voters as shown above, any voter can cast a critical vote in four situations; in the other four situations, the vote is not critical since it cannot change the outcome of the election. For example, C can cast a tie-breaking vote only in situations 3, 4, 5, and 6. The number of combinations in which a voter can cast a tie-breaking vote is

and, as plaintiffs' witness conceded, knowingly avoids and does "not take into account any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation." 24/ The real-life impact of multi-member districts on individual voting power has not been sufficiently demonstrated, at least on this record, to warrant departure from prior cases.

The District Court was more impressed with the other branch of the claim that multi-member districts inherently discriminate against other districts. This was the assertion that whatever the

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23/ (Continued)

$$2 \cdot \frac{(n-1)!}{\frac{n-1}{2}! \cdot \frac{n-1}{2}!},$$

the number of voters. Dividing this result (critical votes) by 2^n (possible combinations), one arrives at that fraction of possible combinations in which a voter can cast a critical vote. This is the theory's measure of voting power. In District K with three voters, the fraction is 4/8, or 50%. In District L with nine voters, the fraction is 140/512, or 28%. Conventional wisdom would give District K one representative and District L three. But under the theory, a voter in District L is not 1/3 as powerful as the voter in District K, but more than half as powerful. District L deserves only two representatives, and by giving it three the state causes voters therein to be overrepresented. For a fuller explanation of this theory, see Banzhaf, Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle, 75 Yale LJ 1309 (1966).

24/ T. 39. Plaintiffs' brief in this Court recognizes the issue: "The obvious question which the foregoing presentation gives rise to is that of whether the fact that a voter in a large multi-member district has a greater mathematical chance to cast a crucial vote has any practical significance." Brief of Appellees [Plaintiffs] p. 14.

individual voting power of Marion County voters in choosing legislators may be, they nevertheless have more effective representation in the Indiana general assembly for two reasons. First, each voter is represented by more legislators and therefore, in theory at least, has more chances to influence critical legislative votes. Second, since multi-member delegations are elected at large and represent the voters of the entire district, they tend to vote as a bloc, which is tantamount to the district having one representative with several votes. 25/ The District Court did not squarely sustain this position, 26/ but it appears to have found it sufficiently persuasive to have suggested uniform districting to the Indiana Legislature and to have eliminated multi-member districts in the court's own plan redistricting the State. See 307 F Supp, at 1368-1383.

[12] We are not ready, however, to agree that multi-member districts, wherever they exist, overrepresent their voters as compared with voters in single-member districts, even if the multi-member delegation tends to bloc-voting. The theory that plural representation itself unduly enhances a district's power and the influence of its voters remains to be demonstrated in practice and in the day-to-day operation of the legislature. Neither the findings of the trial court nor the record before us sustains it, even where bloc voting is posited.

In fashioning relief, the three-judge court appeared to embrace the idea that each member of a bloc-voting delegation has

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25/ Cf. Banzhaf, Weighted Voting Doesn't Work: A Mathematical Analysis, 19 Rutgers L Rev 317 (1965).

26/ It is apparent that the District Court declined to rule as a matter of law that a multi-member district was per se illegal as giving an invidious advantage to multimember district voters in single-member districts or smaller multi-member districts. See 305 F Supp, at 1391-1392.

more influence than legislators from a single-member district. But its findings of fact fail to deal with the actual influence of Marion County's delegation in the Indiana legislature. Nor did plaintiffs' evidence make such a showing. That bloc-voting tended to occur is sustained by the record, and defendant's own witness thought it was advantageous for Marion County's delegation to stick together. But nothing demonstrates that senators and representatives from Marion County counted for more in the legislature than members from single-member districts or from smaller multi-member districts. Nor is there anything in the court's findings indicating that what might be true of Marion County is also true of other multi-member districts in Indiana or is true of multi-member districts generally. Moreover, Marion County would have no less advantage, if advantage there is, if it elected from individual districts and the elected representatives demonstrated the same bloc-voting tendency, which may also develop among legislators representing single-member districts widely scattered throughout the State. 27/ Of course it is advantageous to start with more than one vote for a bill. But nothing before us shows or suggests that any legislative skirmish affecting the State of Indiana or Marion County in particular would have come out differently had Marion County been subdistricted and its delegation elected from single-member-districts.

27/ The so-called urban-rural division has been much talked about. Antagonistic bloc voting by the two camps may occur but it has perhaps been overemphasized. See White & Thomas, Urban and Rural Representation and State Legislative Apportionment, 17 W Pol Q 724 (1964). Legislation dealing with uniquely urban problems may be routinely approved when urban delegations are in agreement but encounter insuperable difficulties when the delegations are split internally. See Kovach, Some Lessons of Reapportionment, 37 The Reporter 26, 31 (Sept 21, 1967).

IV

Rather than squarely finding unacceptable discrimination against out-state voters in favor of Marion County voters, the trial court struck down Marion County's multi-member district because it found the scheme worked invidiously against a specific segment of the county's voters as compared with others. The court identified an area of the city as a ghetto, found it predominantly inhabited by poor Negores with distinctive substantive-law interests and thought this group unconstitutionally underrepresented because the proportion of legislators with residences in the ghetto elected from 1960 to 1968 was less than the ghetto's proportion of the population, less than the proportion of legislators elected from Washington Township, a less populous district, and less than the ghetto would likely have elected had the county consisted of single-member districts. 28/ We find major deficiencies in this approach.

[13] First, it needs no emphasis here that the Civil War Amendments were designed to protect the civil rights of Negroes and that the courts have been vigilant in scrutinizing schemes allegedly conceived or operated as purposeful devices to further racial discrimination. Therehas been no hesitation in striking down those contrivances that can fairly be said to infringe on Fourteenth Amendment rights. Gomillion v. Lightfoot, 364 US 339, 5 L Ed 2d 110, 81 S Ct 125 (1960); Sims v Baggett, 247 F Supp 96 (MD Ala 1965); Smith v Paris, 257 F Supp 901 (MD Ala 1966), aff'd, 386 F2d 979 (CA5 1967). See also Allen v Board of Elections, 393 US 544, 22 L Ed 2d 1, 89 S Ct 817 (1969). But there is no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to

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28/ See the table at Appendix, infra.

further racial or economic discrimination. As plaintiffs concede, "there was no basis for asserting that the legislative districts in Indiana were designed to dilute the vote of minorities." Brief of Appellees, pp. 28-29. Accordingly, the circumstances here lie outside the reach of decisions such as Sims v Baggett, supra.

[14] Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice. We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court to find that inhabitants of the ghetto were regularly exluded from the slates of both major parties, thus denying them the chance of occupying legislative seats. 29/ It appears reasonably clear that the Republican party won four of the five elections from 1960 to 1968, that Center Township ghetto voted heavily Democratic and that ghetto votes were critical to Democratic Party success. Although we

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29/ It does not appear that the Marion County multi-member district always operated to exclude Negroes or the poor from the legislature. In the five general assemblies from 1960-1968, the county's Center Township ghetto had one senator and four representatives. The remainder of the Township, which includes a white ghetto, elected one senator and eight representatives. Census tract 220, inhabited predominantly by Negroes but having different economic and social characteristics according to the trial court, elected one senator and five representatives. Appendix, infra, p —, 29 L Ed 2d p 389. Plaintiffs' evidence indicated that Marion County as a whole elected two Negro senators and seven representatives in those years. Plaintiffs' Exhibit 10.

cannot be sure of the facts since the court ignored the question, it seems unlikely that the Democratic Party could afford to overlook the ghetto in slating its candidates. 30/ Clearly, in

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30/ Plaintiffs' Exhibit 10 purported to list the names and race of both parties' general assembly candidates from 1920 through 1968. For the 1960-1968 period which concerned the District Court, the exhibit purported to show that the Democratic Party slated one Negro representative in 1960; one in 1962; one senator and two representatives in 1964; three representatives in 1966; and one senator and two representatives in 1968. The Republican Party slated one Negro senator in 1960; two representatives in 1966; and three representatives in 1968. The racial designations on the exhibit, however, were excluded as hearsay.

Plaintiffs' Brief (p 23) indicates that in the 1970 elections: ". . . one of the major political parties in Marion County held district 'mini-slating conventions' for purposes of determining its legislative candidates. All of the slated candidates were subsequently nominated in the primary. Black candidates filed in the slating conventions in six of the fifteen Marion County 'districts' including the five which contain parts of the ghetto area. Only two black candidates were slated and nominated including one in the district which contains only a very small part of the ghetto area where the black candidate overwhelmingly defeated the white candidate in a head-on race notwithstanding a very substantial white voting majority. In a district that was almost entirely ghetto a white candidate won almost all of the vote in a head-on race against a black candidate who campaigned primarily on the basis of skin color. All five of the candidates in the 'ghetto districts,' however, avowed a substantial commitment to the substantive interests of black people and the poor."

The record shows that plaintiff Chavis was slated by the Democratic Party and elected to the state senate in 1964. Exhibit 10. Also, plaintiffs Ramsey and Bryant were both slated by the same party as candidates for the House of Representatives in 1968 but were defeated in the general election. Ibid.; see also T 131 (Ramsey), T 133 (Bryant).

One of plaintiff's witnesses, an attorney and political figure in the Republican Party, testified as follows:

"Q. In your experience, Mrs. Allen, aren't tickets put together by party organization to appeal [to] the various interest groups throughout Marion County?

1964—the one election which the Democrats won—the party slated and elected one senator and one representative from

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30/ (Continued)

"A. Yes.

"Q. Among these interest groups, are economic groups, racial groups and others?

"A. Yes.

. . . . . .

"Q. I show you exhibit 5B that is in evidence, showing the location of the elected Republican representatives' homes at the time they filed in the party primary, does it to you somehow reflect an interest in making an appeal to each conceivable faction in the family, in the county area, each geographical interest?

"A. Yes, it does, if I can explain.

"Q. Yes, you may.

"A. Back in 1966, as I stated, we had a real primary fight and at the time we selected our candidates in the primary Republican Action Committee was not real, real strong in some geographical areas, and we felt that necessary to come up with a 15 man slate, many of the people who lived in Center Townhip including myself did not feel ready to run for public office and therefore there was a hiatus in Center Township residents. However, many of the Washington Township residents, I believe at least two Washington Township residents had a number of family and historical ties in this Center Township Area, even though they did not live there and to the best of the Committee's ability they tried to achieve racial, geographical, economical and social diversity on the ticket. I can't say they were entirely successful, but they made a real good attempt and this is a result of their attempts.

"Q. And the real hard driving effort to put the Action Committees through did take place by the residents of Center Township; did it not?

"A. It was an over-all drive. Center Township, having the population it has, could not be ignored." T 145-148.

Plaintiff's lawyer was at the time of the trial the Marion County Democratic chairman, T 256; plaintiff Chavis was a ward chariman and a longtime precinct committeeman, T 77.

Center Township ghetto as well as one senator and four representatives from other parts of Center Township and two representatives from census tract 220, which was within the ghetto area described by plaintiff. 31/ Nor is there any indication that the party failed to slate candidates satisfactory to the ghetto in other years. Absent evidence or findings we are not sure, but it seems reasonable to infer that had the Democrats won all of the elections or even most of them, the ghetto would have had no justifiable complaints about representation. The fact is, however, that four of the five elections were won by Republicans, which was not the party of the ghetto and which would not always slate ghetto candidates—although in 1962 it nominated and elected one representative and in 1968 two representatives from that area. 32/ If this is the proper view of this case, the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls.

On the record before us plaintiffs' position comes to this: that although they have equal opportunity to participate in and influence the selection of candidates and legislators, and although the ghetto votes predominantly Democratic and that

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31/ See Appendix, infra.

32/ See Appendix, infra. In addition, the Republicans nominated and elected one senator (1960), and three representatives (1960, 1966, 1968) from census tract 220, and four representatives (three in 1962, one in 1966) from the nonghetto area of Center Township. Ibid.

Although plaintiffs asserted it, there was no finding by the District Court that Republican legislators residing in the ghetto were not representative of the area or had failed properly to represent ghetto interests in the general assembly.

party slates candidates satisfactory to the ghetto, invidious discrimination nevertheless results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections. But typical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. This is true of both single-member *and* multi-member districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe" districts where the same party wins year after year.

[15] Plainly, the District Court saw nothing unlawful about the impact of typical single-member district elections. The court's own plan created districts giving both Republicans and Democrats several predictably safe general assembly seats, with political, racial or economic minorities in those districts being "unrepresented" year after year. But similar consequences flowing from Marion County multi-member district elections were viewed differently. Conceding that all Marion County voters could fairly be said to be represented by the entire delegation, just as each voter in a single-member district by the winning candidate, the District Court thought ghetto voters' claims to the partial allegiance of eight senators and 15 representatives was not equivalent to the undivided allegiance of one senator and two representatives; nor was the ghetto voters' chance of influencing the election of an entire slate as significant as the guarantee of one ghetto senator and two ghetto representatives.[33/] As the trial court saw it, ghetto voters could

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33/ The comparative merits of the two approaches to metropolitan representation has been much mooted and is still in contention. See the

not be adequately and equally represented unless some of Marion County's general assembly seats were reserved for ghetto residents serving the interests of the ghetto majority. But are poor Negroes of the ghetto any more underrepresented than poor ghetto whites who also voted Democratic and lost, or any more discriminated against than other interest groups or voters in Marion County with allegiance to the Democratic Party, or, conversely, any less represented than Republican areas or voters in years of Republican defeat? We think not. The mere fact that one interest group or another concerned with the outcome of Marion County elections have found themselves outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system.

There is another gap in the trial court's reasoning. As noted by the court, the interest of ghetto residents in certain issues did not measureably differ from that of other voters. Presumably in these respects Marion County's assemblymen were satisfactorily representative of the ghetto. As to other matters, ghetto residents had unique interests not necessarily shared by

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33/ (Continued) authorities cited in n 38, infra, particularly the piece by Kovach and the series of studies by Collins, Dauer, David, Lacy, and Mauer. And, of course, witnesses in the trial court differed on this very issue. Eg ., R 209-214, 223-229, 235-238, 256-258. David and Eisenberg in their study, infra n. 38, concluded that the case for rigid insistence on single-member districting has not been proved. They would prefer a system of small multi-member districts in metropolitan areas to either the larger multi-member district of the single-member district, thereby minimizing the acknowledged shortcomings of each. More generally, still in suspense is definitive judgment about the long-range impact of voting systems and malapportionment on legislative output. Sokolow, After Reapportionment; Numbers or Policies, 19 W Pol Q 21 (1966); Dye, Politics, Economics, and the Public 260-277 (1966); Lockard, The Politics of State and Local Government 290-293 (1969).

others in the community and on these issues the ghetto was invidiously underrepresented absent their own legislative voice to further their own policy views.

Part of the difficulty with this conclusion is that the findings failed to support it. Plaintiffs' evidence purported to show disregard for the ghetto's distinctive interests; defendants claimed quite the contrary. We see nothing in the findings of the District Court indicating recurring poor performance by Marion County's delegation with respect to Center Township ghetto, nothing to show what the ghetto's interests were in particular legislative situations and nothing to indicate that the outcome would have been any different if the 23 assemblymen had been chosen from single-member districts. Moreover, even assuming bloc voting by the delegation contrary to the wishes of the ghetto majority, it would not follow that the Fourteenth Amendment had been violated unless it is invidiously discriminatory for a county to elect its delegation by majority vote based on party or candidate platforms and so to some extent predetermine legislative votes on particular issues. Such tendencies are inherent in government by elected representatives; and surely elections in single-member districts visit precisely the same consequences on the supporters of losing candidates whose views are rejected at the polls.

V

The District Court's holding, although on the facts of this case limited to guaranteeing one racial group to representation is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area

sufficiently compact to constitute a single-member district.[34] This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote.[35] There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests.[36]

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[34] Interestingly enough, in Wright v Rockefeller, 376 US 52, 11 L Ed 2d 512, 84 S Ct 603 (1964), challenge was to a single-member district plan with districts allegedly drawn on racial lines and designed to limit Negroes to voting for their own candidates in safe Negro districts. We rejected the challenge for failure of proof, but noted in passing that " . . . some of these voters . . . would prefer a more even distribution of minority groups among the four congressional districts, but others, like the intervenors in this case, would argue strenuously that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional." 376 US, at 57-58, 11 L Ed 2d at 516.

[35] Plaintiffs' final arguments in the District Court asserted political as well as racial and economic discrimination in the workings of the Marion County district, in that the "political minority," whether Republican or Democrats, is "always shut out" when the opposing party wins. T 254. See n 11, supra.

[36] For discussions of voting systems *designed* to achieve minority representation, see Dixon, infra, n 38, at 516-527; Black, The Theory of Elections in Single-member Constituencies, 15 Can J of Economics and Pol Sci 158 (1949); Silva, infra, n 38, at 744 et seq.; Bedford, The Faces of Justice (1961); Lakeman and Lambert, Voting in Democracies (1959);

At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district systems now widely employed in this county. 37/

[7, 16] We are not insensitive to the objections long voiced to multi-member district plans. 38/ Although not as prevalent

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36/ (Continued) Blair, Cumulative Voting: An Effective Electoral Device in Illinois Politics, 45 Ill Studies in the Social Sciences (1960).

37/ As of November 1970, 46% of the upper houses and 62% of the lower houses in the State contained some multi-member districts. National Municipal League, Apportionment in the Nineteen Sixties (1970). In 1955, it was reported that the figures were 33% and 75%, respectively. Klain, A New Look at the Constituencies, 49 Am Pol Sci Rev 1105 (1955). Though the overall effect of the reapportionment cases on this phenomenon is necessarily somewhat speculative, there is no doubt that some States switched to multi-member districts as a result of those decisions. Prior to the decisions, for example, Vermont's lower house was composed entirely of single-member districts. Id., at 1109. This resulted in the colorful situation of one representative for a town of 33,155 and another for a town of 38 in 1962. National Municipal League, Apportionment in the Nineteen Sixties, at b. Reapportioned and redistricted in light of Reynolds, Vermont's lower house now has 36 multi-member and 36 single-member districts. Buckley v Hoff, 243 F Supp 873 (Vt 1965). Reapportionment has also been credited with abolishing Maryland's tradition of single-member districts in its senate. Burdette, Maryland Reapportionment, in Apportionment in The Nineteen Sixties, supra.

38/ The relative merits of multi-member and single-member plans have been much debated and the general preference for single-member districts has not gone unchallenged. For representative treatment of the subject see:
Dixon, Democratic Representation: Reapportionment in Law and Politics, 461-463, 470-472, 476-490, 503-507 (1968); David and Eisenberg, State Legislative Redistricting: Major Issues in the Wake of Judicial Decision (1962); Barnett, Unitary-Multiple Election Districts, 39 Am Pol Sci Rev 65 (1945); Silva, Compared Values of the Single- and Multi-member Legislative District, 17 W Pol Q 504 (1964); Hamilton, Legislative Constitu-

as they were in our early history, they have been with us since colonial times and were much in evidence both before and after the adoption of the Fourteenth Amendment. 39/ Criticism

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38/ (Continued) encies: Single-member Districts, Multi-member Districts, and Floterial Districts, 20 W Pol Q 321 (1967) (includes a discussion of districting in Indiana); Silva, Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District, 17 W Pol Q 742 (1964); Lindquist, Socioeconomic Status and Political Participation, 17 W Pol Q 608 (1964); Klain, A New Look at the Constituencies: The Need for a Recount and a Reappraisal, 49 Am Pol Sci Rev 1105 (1955); Kovach, Some Lessons of Reapportionment, Reporter Magazine, Sept. 21, 1967, 26; and Collins, Dauer, David, Lacy, and Mauer, Evolving Issues and Patterns of State Legislative Redistricting in Large Metropolitan Areas (1966).

Interesting material with respect to the relative merits of single- and multi-member districts may be found in the congressional debates surrounding the passage in 1842 of the statute requiring representatives to be elected in single-member districts. See n 39, infra. Though the racial considerations present here were, not surprisingly, absent in these pre-Civil War Amendments debates, the concern voiced by congressmen over the submergence of minorities, bloc voting, and party control shows, at least, that the plaintiffs' apprehensions are not entirely new ones. See, e.g., 11 Cong Globe 445-448, 452-453, 463-464 (27th Cong, 2d Sess).

39/ In colonial days, "[m]ultiple districts were the rule, single ones the exception," and "[f]or nearly a century and a half after the Declaration of Independence the American states elected by far the greater part or their lawmakers in multiple constituencies." Klain, A New Look at the Constituencies: The Need for a Recount and a Reappraisal, 49 Am Pol Sci Rev 1105, 1112, 1113 (1955). Although a trend toward single-member districts began long ago, multiple districts are still much in evidence. See n 37, supra. See also David and Eisenberg, State Legislative Redistricting: Major ISsues in the Wake of Judicial Decision 20 (1962); Dixon, Democratic Representation: Reapportionment in Law and Politics 504 (1968).

In 1842, Congress by statute required single-member districts for congressional elections. Act of June 25, 1842, c 47, § 2, 5 Stat 491. The substance of the restriction was continued in RS § 23 and in apportionment legislation in this century until 1929. In 1941, Congress enacted a law

is rooted in their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party as compared with the party's state-wide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests. The chance of winning or significantly influencing intraparty fights and issue-oriented elections has seemed to some inadequate protection to minorities, political, racial, or economic; rather, their voice, it is said, should also be heard in the legislative forum where public policy is finally fashioned. In our view, however, experience and insight have not yet demonstrated that multi-member districts are inherently invidious and violative of the Fourteenth Amendment. Surely the findings of the District Court do not demonstrate it. Moreover, if the problems of multi-member districts

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39/ (Continued) which required that until a State is redistricted in a manner provided by law after decennial reapportionment of the House, representatives were to be elected from the districts prescribed by the law of the State, and that "if any of them are elected from the State at large they shall continue to be so elected," provided that if reapportionment of the House following a census shows that a State is entitled to an increase in the number of representatives, the additional representatives shall be elected at large until the State is redistricted, and if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. Act of November 15, 1941, c 740, § 22(c), 55 Stat 761, 2 USC § 2a(c). In 1967, Congress reinstated the single-member district requirement, "except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress." 81 Stat 581, 2 USC § 2c. Hawaii was the only State to take advantage of this exception. It has districted for the 92d Congress. Hawaii Rev. Stat. § 12-32.5 (1969 Supp).

Congress has not purported to exercise Fourteenth Amendment powers to regulate or prohibit multi-member districts in state elections.

are unbearable or even unconstitutional it is not at all clear that the remedy is a single-member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic or religious groups and with its own capacity for over- and underrepresenting parties and interests and even for permitting a minority of the voters to control the legislature and government of a State. The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them. As presently advised we hold that the District Court misconceived the Equal Protection Clause in applying it to invalidate the Marion County multi-member district.

VI

Even if the District Court was correct in finding unconstitutional discrimination against poor inhabitants of the ghetto, it did not explain why it was constitutionally compelled to disestablish the entire county district and to intrude upon state policy any more than necessary to ensure representation of ghetto interests. The court entered judgment without expressly putting aside on supportable grounds the alternative of creating single-member districts in the ghetto and leaving the district otherwise intact, as well as the possibility that the Fourteenth Amendment could be satisfied by simple requirement that some of the at-large candidates each year must reside in the ghetto. Cf. Fortson v Dorsey, supra.

We are likewise at a loss to understand how on the court's own findings of fact and conclusions of law it was justified in eliminating every multi-member district in the State of Indiana. It did not forthrightly sustain the theory that multi-member districts always overrepresent their voters to the invidious detriment of single-member residents. Nor did it examine any

multi-member district aside from Marion County for possible intradistrict discrimination.

[17, 18] The remedial powers of an equity court must be adequate to the task, but they are not unlimited. Here the District Court erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so.

VII

[19, 20] At the same time, however, we reject defendants' suggestion that the court was wrong in ordering state-wide reapportionment. After determining that Marion County required reapportionment, the court concluded that "it becomes clear beyond question that the evidence adduced in this case and the additional apportionment requirements set forth by the Supreme Court call for a redistricting of the entire state as to both houses of the General Assembly." 305 F Supp, at 1391. This evidence, based on 1960 census figures, showed that Senate district 20, with one senator for 80,496, was overrepresented by 13.68% while district 5, with one senator for 106,790, was underrepresented by 14.52%, for a total variance of 28.20% and a ratio between the largest and smallest districts of 1.327 to 1. The house figures were similar. The variation ranged from one representative for 41,449 in district 39 to one for 53,003 in district 35, for a variance of 24.78% and a ratio of 1.279 to 1. 40/ These variations were in excess of, or very nearly equal to, the variation of 25.65% and the ratio of 1.30 to

40/ The court was also impressed by the 1967 Indiana Board of Health Vital Statistics population estimates which showed a senate variance of 36.83% and a house variance of 37.30%. It did not base its order on these interim figures, however. See 307 F Supp 1362, 1366.

1 which we held excessive for state legislatures 41/ in Swann v Adams, 385 US 440, 17 L Ed 2d 501, 87 S Ct 569 (1967). Even with this convincing showing of malapportionment, the court refrained from action in order to allow the Indiana Legislature to call a special session for the purpose of redistricting. When the legislature ignored the court's findings and suggestion, it was not improper for the court to order state-wide redistricting, as district courts have done from the time Reynolds v Sims, 377 US 533, 12 L Ed 2d 506, 84 S Ct 1362 (1964), and its companion cases were decided. 42/ And see Maryland Committee for Fair Representation v Tawes, 377 US 656, 673, 12 L Ed 2d 595, 606, 84 S Ct 1429 (1964).

41/ See also Kirkpatrick v. Preisler, 394 US 526, 22 L Ed 2d 519, 89 S Ct 1225 (1969), and Wells v Rockefeller, 394 US 542, 22 L Ed 2d 535, 89 S Ct 1234 (1969), in which the Court held that variances of 5.97% and 13.096%, respectively, were impermissible for congressional redistricting.

[20] 42/ In redistricting the State, the District Court divided some counties into several districts, and defendants attack this as an unwarranted violation of Indiana Const Art 4, § 6, which says "no county, for Senatorial apportionment, shall ever be divided." Defendants concede that "[t]he error . . . is not the per se violation" of the constitution, but rather that the court drew its plan "without having meaningfully considered" the dictates of the constitution. Brief for Appellants 49. But the contrary appears to us to be true. The court announced that it "would strive to preserve the integrity of county and township lines" wherever possible, 307 F Supp, at 1364, though it ultimately concluded that the "difficulty of devising . . . compact and contiguous . . . districts within that framework [of mathematical equality] has in large part precluded preservation of county lines." Id., at 1366. We note that none of the state-wide redistricting plans which were submitted for the court's consideration, including those of the house and senate minority leaders and the chairman of the senate majority caucus committee, followed the state constitution in this respect. R 57-137, 198-228.

[21] Nor can we accept defendants' argument that the statutory plan was beyond attack because the District Court had held in 1965 that at that time the plan met the "substantial equality" test of Reynolds. Sout v. Bottorff, 249 F Supp 488 (SD Ind 1965). Defendants do not argue that the 1969 variances were acceptable under the Reynolds test, which has been considerably refined since that decision, see Swann v. Adams, supra. Rather, they contend that because Reynolds indicated that decennial reapportionment would be a "rational approach" to the problem, a State cannot be compelled to reapportion itself more than once in a 10-year period. Such a reading misconstrues the thrust of Reynolds in this respect. Decenial reapportionment was suggested as a presumptively rational method to avoid "daily, monthly, annual or biennial reapportionment" as population shifted throughout the State. 43/ Here, the District Court did not order reapportionment as a result of population shifts since the 1965 Stout decision, but only because the disparities among districts which were thought to be permissible at the time of that decision had been shown by intervening decisions of this Court to be excessive.

We therefore reverse the judgment of the District Court and remand the case the that court for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice Stewart joins in Part I through VI of the Court's opinion, holding that the multi-member districting scheme here

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43/ In any event, the Court was careful to note that "we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable." 377 US, at 584, 12 L Ed 2d at 540.

in issue did not violate the Equal Protection Clause of the Fourteenth Amendment. He dissents from Part VII of the Court's opinion for the reasons expressed in his dissenting opinion in Lucas v Colorado General Assembly, 377 US 713, 744, 12 L Ed 2d 632, 581, 84 S Ct 1459.

The table on page 389 was included in the trial court's findings.

SEPARATE OPINIONS

Separate opinion of Mr. Justice Harlan.

Earlier this Term I remarked on "the evident malaise among the members of the Court" with prior decisions in the field of voter qualifications and reapportionment. Oregon v Mitchell, 400 US 112, 218, 27 L Ed 2d 272, 335, 91 S Ct 260 (1970) (separate opinion of this writer).

Today's opinions in this and two other voting cases now decided 1/ confirm that diagnosis.

I

Past decisions have held that districting in local governmental units must approach equality of voter population "as far as is practicable," Hadley v Junior College District, 397 US 50, 56, 25 L Ed 2d 45, 51, 90 S Ct 791 (1970), and that the "as nearly as is practicable" standard of Wesberry v Sanders, 376 US 1,

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1/ Abate v. Mundt, —US p —, 29 L Ed 2d p 399, 91 S Ct —; Gordon v Lance, — US p —, 29 L Ed 2d p 273, 91 S Ct —.

TABLE NO. 7

Residence of Legislators Elected (By Marion County Area)	*1* *1960–69 Average Population*	*2* *1960–69 Avg. Pop. as Percentage of Marion County Average Pop. 1960*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*	*12*	*13*	*14*	*15*	*16*
			Senators Elected						*Senators Elected as Percent of 1960–68 Total*	*Representatives Elected*						*Representatives Elected as Percent of 1960–68 Total*
			60	*62*	*64*	*66*	*68*	*60-68*		*60*	*62*	*64*	*66*	*68*	*60-68*	
Washington Twp. excluding Tract 220	103,615	13.98	3	1	2	1	3	10	47.52	6	2	5	5	5	23	34.33
Census Tract 220	4,866	0.66	1	0	0	0	0	1	4.75	1	0	2	1	1	5	7.46
Center Twp. excluding Ghetto	172,876	23.32	0	0	1	0	0	1	4.75	0	3	4	1	0	8	11.94
Center Twp. Ghetto	132,000	17.81	0	0	1	0	0	1	4.75	0	1	1	0	2	4	5.97
Pike Twp.	11,031	1.49	0	0	0	0	0	0	0	0	0	0	0	1	1	1.49
Wayne Twp.	105,961	14.30	0	0	0	0	0	0	0	1	2	0	2	2	7	10.45
Decatur Twp.	13,755	1.86	0	0	0	0	0	0	0	0	0	0	1	1	2	2.99
Perry Twp.	59,778	8.07	1	0	1	0	2	4	19.01	0	0	1	1	1	3	4.48
Franklin Twp.	8,929	1.21	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Lawrence Twp.	49,553	6.69	0	0	1	0	1	2	9.51	2	2	0	3	2	9	13.44
Warren Twp.	78,872	10.64	0	0	0	1	1	2	9.51	1	1	2	1	0	5	7.46
Marion County	741,234	[100%]	5	1	6	2	7	21	[100%]	11	11	15	15	15	67	[100%]

305 F. Supp., at 1383.

7-8, 11 L Ed 2d 481, 486, 84 S Ct 526 (1964), for congressional districting forbade a maximum variation of 6%. Kirkpatrick v Preisler, 394 US 526, 22 L Ed 2d 519, 89 S Ct 1225 (1969). Today the Court sustains a local governmental apportionment scheme with a 12% variation. Abate v Mundt, – US –, 29 L Ed 2d 339, 91 S Ct –.

Other past decisions have suggested that multi-member constituencies would be unconstitutional if they could be shown "under the circumstances of a particular case, . . . to minimize or cancel out the voting strength of racial or political elements of the voting population." Fortson v Dorsey, 379 US 433, 439, 13 L Ed 2d 401, 405, 85 S Ct 498 (1965); Burns v Richardson, 384 US 73, 88, 16 L Ed 2d 376, 388, 86 S Ct 1286 (1966). Today the Court holds that a three-judge District Court, which struck down an apportionment scheme for just this reason, "misconceived the Equal Protection Clause." Whitcomb v Chavis, – US at –, 29 L Ed 2d 386.

Prior opinions stated that "once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." Gray v Sanders, 372 US 368, 381, 9 L Ed 2d 821, 830, 83 S Ct 801 (1963); Hadley v Junior College District, 397 US 50, 59, 25 L Ed 2d 45, 52, 90 S Ct 791 (1970). Today the Court sustains a provision that gives opponents of school bond issues half again the voting power of proponents. Gordon v Lance, – US –, 29 L Ed 2d 273, 91 S Ct –.

II

The Court justifies the wondrous results in these cases by relying on different combinations of factors. Abate v Mundt relies on the need for flexibility in local governmental arrangements, the interest in preserving the integrity of political subdivisions, and the longstanding tradition behind New York's

practice in the latter respect. Whitcomb v Chavis finds elementary probability theory too simplistic as a guide to resolution of what is essentially a practical question of political power; the opinion relies on the long history of multi-member districts in this country and the fear that "affirmance of the District Court would spawn endless litigation." – US at –, 29 L Ed 2d at 384. Gordon v Lance relies heavily on the "federal analogy" and the prevalence of similar anti-majoritarian elements in the constitutions of the several States.

To my mind the relevance of such considerations as the foregoing is undeniable and their cumulative effect is unanswerable. I can only marvel, therefore, that they were dismissed, singly and in combination, in a line of cases which began with Gray v Sanders, 372 US 368, 9 L Ed 2d 821, 83 S Ct 801 (1963), and ended with Hadley v Junior College District, 397 US 50, 25 L Ed 2d 45, 90 S Ct 791 (1970).

That line of cases can best be understood, I think, as reflections of deep *personal* commitments by some members of the Court to the principles of pure majoritarian democracy. This majoritarian strain and its nonconstitutional sources are most clearly revealed in Gray v Sanders, 372 US 368, 381, 9 L Ed 2d 821, 830, 83 S Ct 801 (1963), where my Brother Douglas, speaking for the Court, said: "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." If this philosophy of majoritarianism had been given its head, it would have led to different results in each of the cases decided today, for it is in the very nature of the principle that it regards majority-rule as an imperative of social organization, not subject to compromise in furtherance of merely political ends. It is a philosophy which ignores or overcomes the fact that the scheme of the Constitution is one not of majoritarian democracy, but of federal republics, with equality of representation a value subordinate to many others, as both the body of the Constitution and the Fourteenth Amendment itself show on their face. See generally Baker v Carr, 369 US 186, 297-324, 7 L Ed 2d 663, 732-747, 82 S Ct 691 (1962) (Frankfurter, J., dissenting).

III

If majoritarianism is to be rejected as a rule of decision, as the Court implicitly rejects it today, then an alternative principle must be supplied if this earlier line of cases just referred to is still to regarded as good law. The reapportionment opinions of this Court provide little help. They speak in conclusory terms of "debasement" or "dilution" of the "voting power" or "representation" of citizens without explanation of what these concepts are. The answers are hardly apparent, for as the Court observes today in Whitcomb v Chavis: "[a]s our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year" — US at —, 29 L Ed 2d at 381.

A coherent and realistic notion of what is meant by "voting power" might have restrained some of the extreme lengths to which this Court has gone in pursuit of the will-o'-the-wisp of "one man, one vote."

An interesting illustration of the light which a not implausible definition of "voting power" can shed on reapportionment doctrine is provided by the theoretical model created by Professor Banzhaf, to which the Court refers in Whitcomb v Chavis,

— US at — — —, 29 L Ed 2d at 376-378. 2/ This model uses as a measure of voting power the probability that a given voter will cast a tie-breaking ballot in an election. Two further assumptions are made: first, that the voting habits of all members of the electorate are alike; and second, that each voter is equally likely to vote for either candidate before him. On these assumptions, and taking the voting population of Marion County as roughly 300,000, it can be shown that the probability of an individual voter's casting a decisive vote in a given election is approximately .00146. This provides a standard to which "voting power" of residents in other districts may be compared. See generally Banzhaf, Multi-Member Electoral Districts–Do They Violate the "One Man, One Vote" Principle, 75 Yale LJ 1309 (1966).

However, Professor Banzhaf's model also reveals that minor variations in assumptions can lead to major variations in results. For instance, if the temper of the electorate changes by one-half of one percent, 3/ each individual's voting power is reduced by a factor of approximately 1,000,000. Or if a few of the

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2/ The Court, though stating that it does "not quarrel with plaintiffs' mathematics," nevertheless implies that it may be ignored because "the position remains a theoretical one . . . and does 'not take into account any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation.' " — US at — — —, 29 L Ed 2d at 377. Precisely the same criticism applies, with even greater force, to the "one man, one vote" opinions of this Court. The only relevant difference between the elementary arithmetic on which the Court relies and the elementary probability theory on which Professor Banzhaf relies is that calculations in the latter field cannot be done on one's fingers.

3/ More precisely, the result follows if the second of Professor Banzhaf's assumptions is altered so that the probability of each voter's selecting candidate A over candidate B is 50.5% rather that 50%.

300,000 voters are committed–say 15,000 to candidate A and 10,000 to candidate B 4/ –the probability of any individual's casting a tie-breaking vote is reduced by a factor on the rough order of 120,000,000,000,000,000,000. Obviously in comparison with the astronomical differences in voting power which can result from such minor variations in political characteristics, the effects of the 12% and 28% population variations considered in Abate v Mundt and in Whitcomb v Chavis are de minimis, and even the extreme deviations from the norm presented in Baker v Carr, 369 US 186, 7 L Ed 2d 663, 82 S Ct 691 (1962), and Avery v Midland County, 390 US 474, 20 L Ed 2d 45, 88 S Ct 1114 (1968), pale into insignificance. 5/

It is not surprising therefore that the Court in Whitcomb declines to embrace the measure of voting power suggested by Professor Banzhaf. But it neither suggests an alternative nor considers the consequences of its inability to measure what it purports to be equalizing. See n. 2, supra. Instead it becomes enmeshed in the haze of slogans and numerology which for 10 years has obscured its vision in this field, and finally remands the case "for further proceedings consistent with [its] opinion." — US at —, 29 L Ed 2d at 387. This inexplicit mandate is at least subject to the interpretation that the court below is to inquire into such matters as "the actual influence of Marion County's delegation in the Indiana legislature," ante, at –, 29 L Ed 2d at 378, and the possibility of "recurring poor performance by Marion County's delegation with respect to Center

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4/ The text assumes that each of the remaining 275,000 voters is equally likely to vote for A or for B.

5/ "There is something fascinating about science. One gets such wholesale returns of conjecture out of such a trifling investment of fact." M. Twain, Life on the Mississippi 109.

Township ghetto," — US at —, 29 L Ed 2d at 383, with a view to determining whether "any legislative skirmish affecting the State of Indiana or Marion County in particular would have come out differently had Marion County been subdistricted and its delegation elected from single-member-districts." — US at —, 29 L Ed 2d at 379. If there are less appropriate subjects for federal judicial inquiry, they do not come readily to mind. The suggestion implicit in the Court's opinion that appellees may ultimately prevail if they can make their record in these and other like respects should be recognized for what it is: a manifestation of frustration by a Court that has become trapped in the "political thicket" and is looking for the way out.

This case is nothing short of complete vindication of Mr. Justice Frankfurter's warning 10 years ago "of the mathematical quagmire (apart from divers judicially inappropriate and elusive determinants) into which this Court today catapults the lower courts of the country." Baker v Carr, 369 US 186, 268, 7 L Ed 2d 663, 715, 82 S Ct 691 (1962) (dissenting opinion). With all respect, it also bears witness to the morass into which the Court has gotten itself by departing from sound constitutional principle in the electoral field. See the dissenting opinion of Mr. Justice Frankfurter in Baker v Carr, supra, and the separate opinions of this writer in Reynolds v Sims, 377 US 533, 589, 12 L Ed 2d 506, 543, 84 S Ct 1362 (1964), and in Oregon v Mitchell, 400 US 112, 152, 27 L Ed 2d 272, 297, 91 S Ct 260 (1970). Hopefully, the day will come when the Court will frankly recognize the error of its ways in ever having undertaken to restructure state electoral processes.

I would reverse the judgment below and remand the case to the District Court with directions to dismiss the complaint.

Mr Justice Douglas, with whom Mr. Justice Brennan and Mr. Justice Marshall concur, dissenting.

The Indiana Constitution provides that "no county for Senatorial apportionment, shall ever be divided." Article 4, § 6. The legislative apportionment statutes in Indiana which implemented that provision gave Marion County eight senators, all elected at large. The statutes also gave the county 15 at-large representatives.

Marion County is the most populous in the State. It contains nine townships and includes the city of Indianapolis. On January 9, 1969, this lawsuit was commenced to require a subdivision of the multi-member districting practiced in Marion County. Certain voters contended that the multi-member district deprived them of equal protection of the laws because it diluted the voting rights of an identifiable racial minority within the county.

To determine if there was an identifiable minority within the county the District Court adopted the following definition of "ghetto":

"A primarily residential section of an urban area characterized by a higher relative density of population and a higher relative proportion of substandard housing than in the overall metropolitan area which is inhabited predominately by members of a racial, ethnic, or other minority group, most of whom are of lower socio-economic status than the prevailing status in the metropolitan area and whose residence in the section is often the result of social, legal, economic restrictions or custom."

Applying the definition to the extensive evidence in the case, the District Court found there was an identifiable ghetto area within Center Township. The court then contrasted the residence of those elected to the state House and Senate from Marion County since 1960. There had been 21 elected senators; two came from Center Township, 11 from Washington Township. Of the 67 representatives, 12 came from Center Township

and 28 from Washington Township.

The District Court concluded:

"The inequity of representation by residence of legislators between Washington and Center Townships is apparent . . . . Washington Township the upper middle-class and wealthy suburban area having 14.64% of the population of Marion County, was the residence of 52.27% of the senators and 41.79% of the representatives. Center Township, having 41.14% of the population (approximately three times as large), was the residenc of 9.51% of the senators (less than one-fifth of Washington Township) and 17.91% of the representatives (approximately three-sevenths of Washington Township)."

The court found that the voting strenght of the cognizable element within Center Township was severely minimized, that minimization occurred by virtue of the strong control which the political parties exert over the nomination process in Marion County, and that Black voters within Center Township are unable to be assured of the opportunity of voting for prospective legislators of their choice. The court further found that "[u]nder the evidence before the Court such invidious effects will continue so long as Marion County is apportioned into large senate and house multi-member districts."

I

Based on its findings the District Court held the then Indiana apportionment acts unconstitutional and enjoined their enforcement. The court then determined that to redistrict Marion County alone would leave constitutionally impermissible population variances between the newly created districts and the other districts in the State and therefore redistricting the entire State was necessary. In its redistricting plan the District Court divided well over half of the counties in the State despite

Article 4, § 6 of the Indiana Constitution. Marion County itself was divided into seven separate senatorial districts and an eighth was created by taking part of Marion and parts of Johnson and Morgan Counties. The court mandated that the 1970 election be conducted in accordance with the plan it approved and the court retained jurisdiction for the purpose of passing on any future claims of unconstitutionality made by the plaintiffs against any future legislative apportionment plan promulgated. This Court stayed the District Court's order. 396 US 1055, 24 L Ed 2d 757, 90 S Ct 748.

This suit was commenced some 22 months before the 1970 election in ample time for a decision on the merits. The plaintiffs in fact won below but this Court stayed the order. Now the election has been held and a federal decennial census has been taken. Under the compulsion of the decree of the District Court the legislature has adopted single-member districts for the entire State. But absent a federal decree they would certainly follow the mandate of the Indiana Constitution.

As the Court says, the fact that the 1970 election is history does not affect underlying claim in this case. We have a finding of fact that an identifiable racial minority has its voting strength severely minimized by the operation of multi-member districts. We also have a finding that the invidious effects will continue so long as Marion County has multi-member districts. Under the order of the District Court (absent our stay) the 1965 apportionment statutes could not be used. The District Court would retain jurisdiction and no attempt by the state legislature to apply Article 4, § 6 of their constitution would be successful because under the conclusions of the District Court it is unconstitutional as applied to Marion County. See Reynolds v Sims, 377 US 533, 584, 12 L Ed 2d 506, 540, 84 S Ct 1362. There is no chance that the Indiana Constitution can be amended in time to undo the harm. By its own provisions any amendment requires a majority vote in each house of two consecutive

General Assemblies; it is then referred to the voters and ratified by majority vote. Art 16, § 1.

The Indiana Constitution requires "an enumeration . . . of all male inhabitants over the age of twenty-one years" to be made every six years. Art 4, § 4. Then at the next legislative session, the General Assembly is directed to reapportion the State according to the number of male inhabitants above the age of 21. Art 4, § 5. These provisions fell into disuse and the last enumeration provided for was in 1921 and, prior to Baker v Carr, 369 US 186, 7 L Ed 2d 663, 82 S Ct 691, the legislature had not been apportioned since that time. See Matthews v Handley, 179 F Supp 470 (ND Ind 1961); Fruit v Metropolitan School District, 241 Ind 621, 172 NE2d 864. Indiana courts had no power to require reapportioning under the state constitution. Parker v State ex rel. Powell, 133 Ind 178, 32 NE 836.

In 1969 the legislature initially approved proposed constitutional changes to those two sections which will provide for using the federal decennial census for Indiana and apportioning the State immediately thereafter, such apportionment to remain unaltered until the next decennial census. SJ Res No. 26, Acts 1969, c 464. The provision must still be approved by the 1971 General Assembly and a majority of the voters. See Art 16, § 1, of the Indiana Constitution. At the time this case was argued under the Indiana Apportionment Act of 1965, c 4, § 1, and c 5, § 1, the 1960 Decennial Census was accepted as correct.

Nor does the fact that the state legislature has passed a reapportionment plan abolishing multi-member districts throughout the entire State moot this case. But for the decision below no such plan would have been forthcoming. The plan is in plain violation of the state constitution and in view of the fact that no Indiana Legislature has ever violated the provision of the state constitution before it is obvious that the impetus

came from the outside. 1/ The provision of the state constitution forbidding dividing a county for senatorial apportionment is unconstitutional under the Federal Constitution as applied to Marion County. See Reynolds v Sims, 377 US 533, 584, 12 L Ed 2d 506, 540, 84 S Ct 1362. Mooting the case would accomplish nothing. If we were to moot it, the state courts would likely void the 1971 apportionment plan as violative of the state consitution and then the parties would be right back where they were at the beginning of this law suit. It is apparent this controversy remains alive and that there is no reason to wait two or more years in order to decide it in a case growing out of a state court determination on the constitutionality of single-member districts in Marion County, as would happen should we vacate the decree below and force the parties to another forum for another round of litigation on the same issue.

The constitutional provision which now requires multi-member senatorial districts has been in Indiana's constitution from the date of enactment–1851. And the ghetto voters' position as a class will not change. The findings of the District Court clearly state the invidious effects will last so long as multi-member districting lasts. The District Court found that "to redistrict Marion County alone, so as to provide districts meeting constitutional standards, would leave constitutionally impermissible population variances between the newly created districts in Marion County and other districts in the state." Accordingly the court redistricted the entire State. 2/ The

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1/ Wallace, Legislative Apportionment In Indiana, 42 Ind LJ 6, 30 (1966).

2/ The District Court also found independent of the new districts that there were impermissible population variances in the Indiana apportionment. The ratio between the largest and smallest Senate district was 1.327 to 1. For the House it was 1.279 to 1. Under the plan promuigated by the District Court these were reduced to 1.017 to 1 and 1.020 to 1 respectively.

decision to redistrict the State and the finding of minimization of the ghetto voters' strength are intertwined. As the District Courted stated, "the portions of the statutes relating to Marion County were found to be not severable from the full body of the statutes." There is no showing here that finding is even partially erroneous let alone clearly erroneous. A decision to redistrict Marion County involves the entire State; each properly must be considered with the other.

II

The merits of the case go to the question reserved in Fortson v Dorsey, 379 US 433, 439, 13 L Ed 2d 401, 405, 85 S Ct 498, and in Wells v Rockefeller, 394 US 542, 544, 22 L Ed 2d 535, 537, 89 S Ct 1234, whether a gerrymander can be "constitutionally impermissible." The question of the gerrymander 3/ is the other half of Reynolds v Sims, 377 US 533, 12 L Ed 2d 506, 84 S Ct 1362. Fair representation of voters in a legislative assembly—one man, one vote—would seem to require (1) substantial equality of population within each district and (2) the avoidance of district lines that weigh the power of one race more heavily than another. The latter can be done—and is done—by astute drawing of district lines that makes the district either heavily Democratic or heavily Republican as the case may be. Lines may be drawn so as to make the voice of one racial group weak or strong, as the case may be.

The problem of the gerrymander is how to defeat or circumvent the sentiments of the community. The problem of the law is how to prevent it. As Mr. Justice Harlan once said "A computer may grind out district lines which can totally

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3/ See Tyler & Wells, The New Gerrymander Threat, AFL-CIO American Federationist, Feb 1971, p 1.

frustrate the popular will on an overwhelming number of critical issues." Wells v Rockefeller, 394 US, at 551, 22 L Ed 2d at 531 (dissenting). The easy device is the gerrymander. The District Court found that it operated in this case to dilute the vote of the blacks.

III

In Gomillion v. Lightfoot, 364 US 339, 5 L Ed 2d 110, 81 S Ct 125, we dealt with the problem of a State intentionally making a district smaller to exclude black voters. Here we have almost the converse problem. The State's district surround the black voting area with white voters.

Gomillion, involving the turning of the City of Tuskegee from a geographical square "to an uncouth twenty-eight-sided figure," 364 US, at 340, 5 L Ed 2d at 112, was only one of our cases which dealt with elevating the political interests of one identifiable group over those of another. Georgia's county unit system was similar, although race was not a factor. Under the Georgia system a farmer in a rural county could have up to 99 times the voting power of his urban-dwelling brother. See Gray v Sanders, 372 US 368, 9 L Ed 2d 821, 83 S Ct 801. Here the districting plan operates to favor "upper-middle class and wealthy" suburbanites.

A showing of racial motivation is not necessary when dealing with multi-member districts. Burns v Richardson, 384 US 73, 88, 16 L Ed 2d 376, 388, 86 S Ct 1286; Fortson v Dorsey, 379 US 433, 439, 13 L Ed 2d 401, 405, 85 S Ct 498. Although the old apportionment plan which is in full harmony with the State's 1851 constitution, may not be racially motivated, the test for multi-member districts is whether there are invidious effects.

That rule is but an application of a basic principle applied in

Hunter v Erickson, 393 US 385, 21 L Ed 2d 616, 89 S Ct 557. There a city passed a housing law which provided that before an ordinance regulating the sale or lease of realty on the basis of race could become effective it must be approved by a majority vote. Thus the protection of minority interests became much more difficult. We held that a State or a state agency could not in its voting scheme so disadvantage black interests.

Multi-member districts are not per sen unconsitutional. Fortson v Dorsey, 379 US 433, 439, 13 L Ed 2d 401, 405, 85 S Ct 498. In that case we expressly reserved judgment on the question of whether a multi-member districting plan which operated "to minimize or cancel out the voting strength of racial or political elements of the voting population" could pass constitutional muster. 379 US, at 439, 13 L Ed 2d at 405.

In Burns v Richardson, supra, we again considered the problems of multi-member districts. The doubts noted in Fortson v Dorsey were resolved and we stated that assuming the requirements of Reynolds v Sims, 377 US 533, 12 L Ed 2d 506, 84 S Ct 1362, were satisfied, multi-member districts are unconstitutional "only if it can be shown that 'designedly or otherwise' . . . [such a district would operate] to minimize or cancel out the voting strength of racial or political elements of the voting population." 384 US, at 88, 16 L Ed 2d at 388. We went on to suggest how the burden of proof could be met.

"It may be that this invidious effect can more easily be shown if, in contrast to the facts in Fortson, districts are large in relation to the total numbers of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one." Ibid.

These factors are all present in this case. Between the largest

(Marion) and second largest (Lake) counties in the State, 26% of each house of the legislature is controlled. There is no subdistricting under the Indiana plan. Cf. Dusch v Davis, 387 US 112, 18 L Ed 2d 656, 87 S Ct 1554. And multi-member districts are used in both houses of the legislature.

In both Fortson and Burns we demanded that the invidious effects of multi-member districts appear from evidence in the record. Here that demand is satisfied by (1) the showing of an identifiable voting group living in Center Township, (2) the severe discrepancies of residency of elected members of the general assembly between Center and Washington Townships, cf. Brennan, J., dissenting in Abate v Mundt, — US —, 29 L Ed 2d 404, 91 S Ct —, (3) the finding of pervasive influence of the county organizations of the political parties, and (4) the finding that legislators from the county maintain "common, undifferentiated" positions on political issues. 4/

IV

Little time need be spent on the District Court's decision to redistrict the entire State. The court found that there were already impermissible population variances between districts under the current apportionment plan. The ratio between the largest and smallest senate district was 1.327 to 1. For the house it was 1.279 to 1. The court also found that the new Marion County districts would also have impermissible population variances when compared to existing districts.

4/ The three-judge court "emphasized that the black plaintiffs were members of an identifiable interest group whose voting strength had been minimized by the multi-member districting scheme. They were not only unable to elect a legislator who was attuned to their interests, but were also saddled with lawmakers who reflected white suburban ideology and were controlled by political leaders." Solomon, Chavis v Whitcomb, 24 Rutgers L Rev 521, 533 (1970).

[19-21] On these facts the demands of our decisions required redistricting. As Reynolds v Sims showed, the state constitution must give way to requirements of the Supremacy Clause when there is a conflict with the Federal Constitution. And finally the District Court's own plan was exemplary. The population ratio for the largest and smallest senate districts was 1.017 to 1 and for the house it was 1.020 to 1.

V

It is said that if we prevent racial gerrymandering today, we must prevent gerrymandering of any special interest group tomorrow, whether it be social, economic, or ideological. I do not agree. Our Constitution has a special thrust when it comes to voting; the Fifteenth Amendment says the right of citizens to vote shall not be "abridged" on account of "race, color, or previous condition of servitude."

Our cases since Baker v Carr have never intimated that "one man, one vote" meant "one white man, one vote." Since "race" may not be gerrymandered, I think the Court emphasizes the irrelevant when it says that the effect on "the actual voting power" of the blacks should first be known. They may be all Democratic or all Republican; but once their identity is purposefully washed out of the system, the system, as I see it, has a constitutional defect. It is asking the impossible for us to demand that the blacks first show that the effect of the scheme was to discourage or prevent poor blacks from voting or joining such party as they chose. On this record, the voting rights of the blacks have been "abridged," as I read the Constitution.

The District Court has done an outstanding job, bringing insight to the problems. One can always fault a lower court by stating theoretical aspects of apportionment plans that may not have been considered. This District Court acted earnestly and boldly to correct a festering electoral system. I would not

even vacate and remand so that it could revise its plan in accordance with the 1970 census figures. That court has retained jurisdiction of the cause and has sense enough to update its own plan. We can make the contribution of the District Court enormous and abiding by leaving it the initiative to carry out the mandate of Reynolds v Sims.

I would affirm the judgment.

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No. 72-147

Mark White, Jr., et al.,
Appellants,
v.
Diana Regester et al.

On Appeal from the United States District Court for the Western District of Texas.

[June 18, 1973]

Syllabus

In this litigation challenging the Texas 1970 legislative reapportionment scheme, a three-judge District Court held that the House plan, statewide, contained constitutionally impermissible deviations from population equality, and that the multimember districts provided for Bexar and Dallas Counties invidiously discriminated against cognizable racial or ethnic groups. Though the entire plan was declared unvalid, the court permitted us use for the 1972 election except for its injunction order requiring those two county multimember districts to be reconstituted into single-member districts. *Held*:

1. This Court has jurisdiction under 28 U.S.C. § 1253 to consider the appeal from the injunction order applicable to the Bexar County and Dallas County districting since the three-judge court had been properly convened, and this Court can review the declaratory part of the judgment below. *Roe v. Wade*, 410 U.S. 113.

2. State reapportionment statutes are not subject to the stricter standards applicable to congressional reapportionment under Art. I, § 2, and the District Court erred in concluding that this case, where the total maximum variation between House districts was 9.9%, but the average deviation from the ideal was 1.82%, involved invidious discrimination in violation of the Equal Protection Clause. Cf. *Gaffney v. Cummings*, *ante*, p. —.

3. The District Court's order requiring disestablishment of the multimember districts in Dallas and Bexar Counties was warranted in the light of the history of political discrimination against Negroes and Mexican-Americans residing, respectively, in those counties and the residual effects of such discrimination upon those groups.

343 F. Supp. 704, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in Parts I, III, and IV of which all Members joined, and in Part II of which BURGER, C.J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, which DOUGLAS and MARSHALL, JJ., joined.

MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises two questions concerning the validity of the reapportionment plan for the Texas House of Representatives adopted in 1970 by the State Legislative Redistricting Board: First, whether there were unconstitutionally large variations in population among the districts defined by the plan; second, whether the multimember districts provided for Bexar and

Dallas Counties were properly found to have been invidiously discriminatory against cognizable racial or ethnic groups in those counties.

The Texas Constitution requires the state legislature to reapportion the House and Senate at its first regular session following the decennial census. Tex. Const., Art. III, § 28.[1] In 1970,

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[1] Article III, § 28, of the Texas Constitution provides:

"The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion to the state into senatorial and representative districts, agreeable to the provisions of Sections 25, 26, and 26-a of this Article. In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislature Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding statewide general election. The Supreme Court of Texas shall have jurisdiction to compel such Commission ot perform its duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. The Legislature shall provide necessary funds for clerical and technical aid and for other expenses incidental to the work of the Board, and the Lieutenant Governor and the Speaker of the House of Representatives shall be entitled to receive per diem and travel expense during the Board's session in the same manner and amount as they would receive while attending a special session of the Legislature. This amendment shall become effective January 1, 1951. As amended Nov. 2, 1948."

the legislature proceeded to reapportion the House of Representatives but failed to agree on a redistricting plan for the Senate. Litigation was immediately commenced in state court challenging the constitutionality of the House reapportionment. The Texas Supreme Court held that the legislature's plan for the House violated the Texas Constitution.[2] *Smith v. Craddick*, 471 S.W. 2d 375 (Tex. 1971). Meanwhile, pursuant to the requirements of the Texas Constitution, a Legislative Redistricting Board had been formed to begin the task of redistricting the Texas Senate. Although the Board initially confined its work to the reapportionment of the Senate, it was eventually ordered, in light of the judicial invalidation of the House plan, to also reapportion the House. *Mauzy v. Legislative Redistricting Board*, 471 S.W. 2d 570 (Tex. 1971).

On October 15, 1971, the Redistricting Board's plan for the reapportionment of the Senate was released, and, on October 22, 1971, the House plan was promulgated. Only the House plan remains at issue in this case. That plan divided the 150-

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[2] The Court held that the plan violated Art. III, § 26, of the Texas Constitution, which provides:

"The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties."

member body among 79 single-member and 11 multimember districts. Four lawsuits, eventually consolidated, were filed challenging the Board's Senate and House plans and asserting with respect the the House plan that it contained impermissible deviations from population equality and that its multimember districts for Bexar County and Dallas County operated to dilute the voting strength of racial and ethnic minorities.

A three-judge District Court sustained the Senate plan, but found the House plan unconstitutional. *Graves v. Barnes*, 343 F. Supp. 704 (WD Tex. 1972). The House plan was held to contain constitutionally impermissible deviations from population equality, and the multimember districts in Bexar and Dallas Counties were deemed constitutionally invalid. The District Court gave the Texas Legislature until July 1, 1973, to reapportion the House, but the District Court permitted the Board's plan to be used for purposes of the 1972 election, except for requiring that the Dallas County and Bexar County multimember districts be reconstituted into single-member districts for the 1972 election.

The State appealed the statewide invalidation of the House plan and the substitution of single-member for multimember districts in Dallas County and Bexar County. 3/ MR. JUSTICE POWELL denied a stay of the judgment of the District Court, 405 U.S. 1201, and we noted probable jurisdiction. 409 U.S. 840.

3/ In a separate appeal, we summarily affirmed that portion of the judgment of the District Court upholding the Senate plan. *Archer v. Smith*, 409 U.S. 808 (1972).

I

We deal at the outset with the challenge to our jurisdiction over this appeal under 28 U.S.C. § 1253, which permits injunctions in suits required to be heard and determined by a three-judge district court to be appealed directly to this Court. 4/ It is first suggested that the case was not one required to be heard by a three-judge court. The contention is frivolous. A statewide reapportionment statute was challenged and injunctions were asked against its enforcement. The constitutional questions raised were not insubstantial on their face and the complaint clearly called for the convening of a three-judge court. That the court declared the entire apportionment plan invalid, but entered an injunction only with respect to its implementation for the 1972 elections in Dallas and Bexar Counties, in no way indicates that the case required only a single judge. The State is therefore properly here on direct appeal with respect to the injunction dealing with Bexar and Dallas Counties, for the order of the court directed at those counties was literally an order "granting . . . and . . . injunction in any civil action . . . required . . . to be heard and determined by a district court of three judges" within the meaning of § 1253.

We also hold that the State, because it appealed from the entry of an injunction, is entitled to review of the District Court's accompanying declaration that the proposed plan for the Texas House of Representatives, including those portions providing for multimember districts in Dallas and Bexar

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4/ 28 U.S.C. § 1253 provides:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Counties, was invalid statewide. This declaration was the predicate for the court's order requiring Dallas and Bexar to be reapportioned into single districts, for its order that "unless the Legislature of the State of Texas on or before July 1, 1973, has adopted a plan to reapportion the legislative districts within the State in accordance with the constitutional guidelines set out in this opinion this court will so apportion the State of Texas"; and for ordering the Secretary of State to "adopt and implement any and all procedures necessary to properly effectuate the orders of this Court in conformance with this Opinion. . . ." In these circumstances although the State could not have directly appealed to this Court the entry of a declaratory judgment unaccompanied by any injunctive relief. *Gunn v. University Committee*, 399 U.S. 383 (1970); *Mitchell v. Donovan*, 398 U.S. 427 (1970), we conclude that we have jurisdiction of the State's entire appeal. *Roe v. Wade*, 410 U.S. 113 (1973); *Florida Lime & Avocado Growers v. Jacobson*, 362 U.S. 73 (1960). With the Texas reapportionment plan before it, it was in the interest of judicial economy and the avoidance of piecemeal litigation that the three-judge District Court have jurisdiction over all claims raised against the statute when a substantial constitutional claim was alleged, and an appeal to us, once properly here, has the same reach. *Roe v. Wade, supra*, at 123; *Carter v. Jury Comm'n*, 396 U.S. 320 (1970); *Florida Lime & Avocado Growers v. Jacobson, supra*, at 80.

II

The reapportionment plan for the Texas House of Representatives provides for 150 representatives to be selected from 79 single-member and 11 multimember districts. The ideal district is 74,645 persons. The districts range from 71,597 to 78,943 in population per representative, or from 5.8% overrepresentation to 4.1% underrepresentation. The total variation between

largest and smallest district is thus 9.9%. 5/

The District Court read our prior cases to require any deviations from equal population among districts to be justified by "acceptable reasons" grounded in state policy; relied on *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), to conclude that the permissible tolerances suggested by *Reynolds v. Sims*, 377 U.S. 533 (1964), had been substantially eroded; suggested that *Abate v. Mundt*, 403 U.S. 182 (1971), in accepting total deviations of 11.9% in a county reapportionment was *sui generis*; and considered the "critical issue" before it to be whether "the State [has] justified any and all variances, however small, on a basis of a consistent, rational State policy." 343 F. Supp., at 713. Noting the single fact that the total deviation from the ideal between District 3 and District 85 was 9.9%, the District Court concluded that justification by the State was called for and could discover no acceptable state policy to support the deviations. The District Court was also critical of the actions and procedures of the Legislative Reapportionment Board and doubted "that [the] board did the sort of deliberative job . . . worthy of judicial abstinence *Id.*, at 717. It also considered the combination of single-member and multimember districts in the House plan "haphazard," particularly in providing single-member districts in Houston and multimember districts in other metropolitan areas, and that this "irrationality, without reasoned justification, may be a separate ground for declaring the entire plan unconstitutional." 6/ Finally, the court specifically invalidated the use of multimember districts in Dallas

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5/ See Appendix to opinion of the Court.

6/ It may be, although we are not sure, that the District Court would have invalidated the plan statewide because of what it thought was an irrational mixture of multi- and single-member districts. Thus no questioning the use of single-member districts in Houston but multimember dis-

and Bexar Counties as unconstitutionally discriminatory against a racial or ethnic group.

The District Court's ultimate conclusion was that "the apportionment plan for the State of Texas is unconstitutional as unjustifiably remote from the ideal of 'one man, one vote' and that the multi-member districting schemes for the House of Representatives as they relate specifically to Dallas and to Bexar Counties are unconstitutional in that they dilute the votes of racial minorities." *Id.*, at 735.7/

Insofar as the District Court's judgment rested on the conclusion that the population differential of 9.9% from the ideal district between District 3 and District 85 made out a prima facie equal protection violation under the Fourteenth Amendment, absent special justification, the court was in error. It is plain from *Mahan v. Howell*, 410 U.S. 315 (1970), and *Gaffney v. Cummings*, *ante*, p. –, that state reapportionment statutes

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6/ (Continued) tricts in all other urban areas, and remarking that the State had provided neither "compelling" nor "rational" explanation for the differing treatment, the District Court merely concluded that this classification "may be" an independent ground for invalidating the plan. But there are not authorities in this Court for the proposition that the mere mixture of multi- and single-member districts in a single plan, even among urban areas, is invidiously discriminatory, and we construe the remarks not as part of the District Court's declaratory judgment invalidating the state plan but as mere advance advice to the Texas Legislature as to what would or would not be acceptable to the District Court.

7/ The District Court also concluded, contrary to the assertions of certain plaintiffs, that the Senate districting scheme for Bexar County did not "unconstitutionally dilute the votes of any political faction or party." The majority of the District Court also concluded that Senate districting scheme for Harris County did not dilute black votes.

are not subject to the same strict standards applicable to reapportionment of congressional seats. *Kirkpatrick v. Preisler* did not dilute the tolerances contemplated by *Reynolds v. Sims* with respect to state districting, and we did not hold in *Swann v. Adams*, 385 U.S. 440 (1967), or *Kilgarlin v. Hill*, 386 U.S. 120 (1967), nor later in *Mahan v. Howell*, *supra*, that *any* deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause. For the reasons set out in *Gaffney v. Cummings*, *ante*, p. –, we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut; and we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9%, when compared to the ideal district. Very likely, larger differences between districts would not be tolerable without justification "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds v. Sims*, 377 U.S., at 579; *Mahan v. Howell*, *supra*, at –, but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone. The total variation between two districts was 9.9%, but the average deviation of all House districts from the ideal was 1.82%. Only 23 districts, all single-member, were over or underrepresented by more than 3%, and only three of those districts by more than 5%. We are unable to conclude from these deviations alone that appellees satisfied the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause. Because the District Court had a contrary view, its

judgment must be reversed in this respect. 8/

III

We affirm the District Court's judgment, however, insofar as it invalidated the multimember districts in Dallas and Bexar Counties and ordered those districts to be redrawn into single-member districts. Plainly, under our cases, multimember districts are not *per se* unconstitutional, nor are they necessarily unconstitutional when used in combination with single-member districts in other parts of the State. *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Mahan v. Howell*, 410 U.S. 315 (1973); see *Burns v. Richardson*, 384 U.S. 73 (1964); *Fortson v. Dorsey*, 379 U.S. 433 (1965); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964). 9/ But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. See *Whitcomb v. Chavis, supra; Burns v. Richardson, supra; Fortson v. Dorsey, supra.* To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity that did other residents in the district to participate in the political processes and to elect legislators of their choice. *Whitcomb v. Chavis, supra*, at 149-150.

With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F. Supp., at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper or invidious, enhanced the opportunity for racial discrimination, the District Court thought. 10/ More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by

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8/ The Court's conclusion that the variations in this case were not justified by a rational state policy would, in any event, require reconsideration and reversal under *Mahan v. Howell*, 410 U.S. 315 (1973). The Texas Constitution, Art. III, § 26, expresses the state policy against cutting county lines wherever possible in forming representative districts. The District Court recognized the policy but, without the benefit of *Mahan v. Howell*, may have thought the variations too great to be justified by that policy. It perhaps thought also that the policy had not been sufficiently or consistently followed here. But it appears to us that to stay within tolerable population limits it was necessary to cut some county lines and that the State achieved a constitutionally acceptable accommodation between population principles and its policy against cutting county lines in forming representative districts.

9/ See *Whitcomb v. Chavis*, 403 U.S. 124, 141-148 (1971), and the cases discussed in n. 22 of that opinion, including *Kilgarlin v. Hill*, 386 U.S. 120 (1967), where we affirmed the District Court's rejection of petitioners' contention that the combination of single-member, multimember, and floterial districts in a single reapportionment plan was "an unconstitutional 'crazy quilt.'" 386 U.S. at 121.

10/ There is no requirement that candidates reside in subdistricts of the multimember district. Thus, all candidates may be selected from outside the Negro residential area.

the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate-slating in Dallas County.[11] That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." *Id.*, at 727. Based on the evidence before it, the District Court concluded that "the black community has been effectively excluded from participation in the Democratic primary selection process," *id.*, at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner. These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them.

IV

The same is true of the order requiring disestablishment of the multimember district in Bexar County. Consistently with *Hernandez v. Texas*, 347 U.S. 475 (1954), the District Court considered the Mexican-Americans in Bexar County to be an identifiable class for Fourteenth Amendment purposes and proceeded to inquire whether the impact of the multimember district on this group constituted invidious discrimination. Surveying the historic and present condition of the Bexar

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11/ The District Court found that "it is extremely difficult to secure either a representative seat in the Dallas County delegation or the Democratic primary nomination without the endorsement of the Dallas Committee for Responsible Government." 313 F. Supp; 726.

County Mexican-American community, which is concentrated for the most part on the west side of the City of San Antonio, the court observed, based upon prior cases and the record before it that the Bexar community, along with other Mexican-Americans in Texas,[12] had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others." 343 F. Supp., at 728. The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tract in the City of San Antonio. Over 78% of Barrio residents were Mexican-Americans, making up 29% of the county's total population. The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier[13] that makes his participation in community processes extremely difficult, particularly, the court thought, with respect to the political life of Bexar County. "A cultural incompatability . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-American access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary." 343 F. Supp., at 731. The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county and that, although they now occupy a plurality in Bexar County, only five Mexican-Americans since

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12/ Mexican-Americans constituted approximately 20% of the population of the State of Texas.

13/ The District Court found that "[t]he fact that [Mexican-Americans] are reared in a subculture in which a dialect of Spanish is the primary language provides permanent impediments to their educational and vocational advancement and creates other traumatic problems." 343 F. Supp., at 730.

1880 have served in the Texas Legislature from that county. Of these, only two were from the Barrio area. 14/ The District Court also concluded from the evidence that the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests.

Based on the totality of the circumstances, the District Court evolved its ultimate assessment of the multimember district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county. Its judgment was that Bexar County Mexican-Americans "are effectively removed from the political processes of Bexar [County] in violation of all of the *Whitcomb* standards, whatever their absolute numbers may total in that County." *Id.*, at 733. Single-member districts were thought required to remedy "the effects of past and present discriminations against Mexican-Americans," *id.*, and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities.

The District Court apparently paid due heed to *Whitcomb v. Chavis*, *supra*, did not hold that every racial or political group has a constitutional right to be represented in the state legislature, but did, from its own special vantage point, conclude that the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives. On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local

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14/ Two other residents of the Barrio, a Negro and an Anglo-American, have also served in the Texas Legislature.

appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise.

Affirmed in part, reversed in part.

APPENDIX TO OPINION OF WHITE, J.

The Redistricting Board's plan embodied the following districts:

District	Population	Average Multi-Member	(Under) Over	Percent Deviation Over (Under)
1	76,285		1,640	2.2
2	77,102		2,457	3.3
3	78,943		4,298	5.8
4	71,928		(2,717)	(3.6)
5	75,014		369	.5
6	76,051		1,406	1.9
7	221,314	73,771	(874)	(1.2)
8	74,303		(342)	(.5)
9	76,813		2,168	2.9
10	72,410		(2,235)	(3.0)
11	73,136		(1,509)	(2.0)
12	74,704		59	.1
13	75,929		1,284	1.7
14	76,597		1,952	2.6
15	76,701		2,056	2.8
16	74,218		(427)	(.6)
17	72,941		(1,704)	(2.3)
18	77,159		2,514	3.4
19 (2)	150,209	75,104	459	.6
20	75,595		947	1.3
21	74,651		6	.0

District	Population	Average Multi-Member	(Under) Over	Percent Deviation Over (Under)
22	73,311		(1,334)	(1.8)
23	75,777		1,132	1.5
24	73,966		(679)	(.9)
25	75,633		988	1.3
26 (18)	1,327,321	73,740	(905)	(1.2)
27	77,788		3,143	4.2
28	72,367		(2,278)	(3.1)
29	76.505		1,860	2.5
30	77,008		2,363	3.2
31	75,025		380	.5
32 (9)	675,499	75,055	410	.5
33	73,071		(1,574)	(2.1)
34	76,071		1,426	1.9
35 (2)	147,553	73,777	(868)	(1.2)
36	74,633		(12)	(.0)
37 (4)	295,516	73,879	(766)	(1.0)
38	78,897		4,252	5.7
39	77,363		2,718	3.6
40	71,597		(3,048)	(4.1)
41	73,678		(967)	(1.3)
42	74,706		61	.1
43	74,160		(485)	(.6)
44	75,278		633	.8
45	78,090		3,445	4.6
46 (11)	826,698	75,154	509	.7
47	76,319		1,674	2.2
48 (3)	220,056	73,352	(1,293)	(1.7)
49	76,254		1,609	2.2
50	74,268		(377)	(.5)
51	75,800		1,155	1.5
52	76,601		1,956	2.6
53	74,499		(146)	(.2)

District	Population	Average Multi-Member	(Under) Over	Percent Deviation Over (Under)
54	77,505		2,860	3.8
55	76,947		2,302	3.1
56	74,070		(575)	(.8)
57	77,211		2,566	3.4
58	75,120		475	.6
59 (2)	144,995	72,497	(2,148)	(2.9)
60	75,054		409	.5
61	73,356		(1,289)	(1.7)
62	72,240		(2,405)	(3.2)
63	75,191		546	.7
64	74,546		(99)	(.1)
65	75,720		1,075	1.4
66	72,310		(2,335)	(3.1)
67	75,034		389	.5
68	74,524		(121)	(.2)
69	74,765		120	.2
70	77,827		3,182	4.3
71	73,711		(934)	(1.3)
72 (4)	297,770	74,442	(203)	(.3)
73	74,309		(336)	(.5)
74	73,743		(902)	(1.2)
75 (2)	147,722	73,861	(784)	(1.1)
76	76,083		1,438	1.9
77	77,704		3,059	4.1
78	71,900		(2,745)	(3.7)
79	75,164		519	.7
80	75,111		466	.6
81	75,674		1,029	1.4
82	76,006		1,361	1.8
83	75,752		1,107	1.5
84	75,634		989	1.3

District	Population	Average Multi-Member	(Under) Over	Percent Deviation Over (Under)
85	71,564		(3,081)	(4.1)
86	73,157		(1,488)	(2.0)
87	73,045		(1,600)	(2.1)
88	75,076		431	.6
89	74,206		(439)	(.6)
90	74,377		(268)	(.4)
91	73,381		(1,264)	(1.7)
92	71,908		(2,737)	(3.7)
93	72,761		(1,884)	(2.5)
94	73,328		(1,317)	(1.8)

Charles F. ZIMMER, Plaintiff,
Stewart Marshall, Intervenor-Appellant,

v.

John J. McKEITHEN et al.,
Defendants-Appellees.
No. 71-2649.

United States Court of Appeals
Fifth Circuit.
Sept. 12, 1973.

Action for reapportionment of school board and police juries in Louisiana Parish. The United States District Court for the Western District of Louisiana, Benjamin C. Dawkins, Jr., Chief Judge, ordered at-large elections, and plaintiffs appealed. The Court of Appeals, 467 F. 2d 1381, affirmed. On rehearing en banc, the Court of Appeals, Gewin, Circuit Judge, held that although population is the proper measure of equality in apportionment, access to the political process and not population is the barometer of dilution of minority voting strength and that repudiation of at-large elections for police jury and school board would be justified in view of confluence of factors, including past racial discrimination, supporting contention that at-large electoral scheme would have worked a diminution of black voting strength, and that fact that three black candidates had been successful in immediately preceding election did not dictate finding that at-large scheme did not in fact dilute black vote.

Panel decision reversed; judgment of district court vacated and cause remanded.

Coleman, Circuit Judge, dissented in part and filed opinion in which Ingraham, Circuit Judge, joined.

Clark, Circuit Judge, dissented and filed opinion in which Dyer, Morgan and Roney, Circuit Judges, joined.

1. Counties Key 38

The dilution standard, i.e., whether an apportionment scheme operates to minimize or cancel out voting strength of racial or political elements of the voting population, is a viable means of reconciling the disparate treatment of governmental body approved apportionment plans and court-approved plans under Voting Rights Act of 1965. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

2. Elections Key 12

Provision of Voting Rights Act of 1965 governing alteration of voting qualifications and procedures by subject state or political subdivisions covers attempts to administer voting practices as well as attempts to enact them. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

3. Constitutional Law Key 225(1)

Concept of population in fair representation cases is not possessed of any talismanic quality; to rely on population statistics, to exclusion of all other factors, is to give such statistics greater sanctity than that which the law permits or requires. U.S.C.A. Const. Amends. 14, 15.

4. Constitutional Law Key 225(1)

Inherent in concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable and second, that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population. U.S.C.A. Const. Amends. 14, 15.

5. Constituional Law Key 225(1)

Although population is the proper measure of equality in apportionment, access to the political process and not population is not the barometer of dilution of minority voting strength. U.S.C.A. Const. Amends. 14, 15.

6. Counties Key 38

Legal standards for determining submergence of voting strength of racial elements of the voting population admit of no distinction on basis of size of population alone; preference for single-member districts in large districts is of no moment where a showing of dilution has been made. U.S.C.A. Const. Amends. 14, 15.

7. Constitutional Law Key 215

Minorities are not be be exposed and subject to apportionment schemes otherwise constitutionally infirm because the equal protection clause can be watered down on the basis of population statistics alone. U.S.C.A. Const. Amends. 14, 15.

8. Constitutional Law Key 225(1)

Elections with respect to certain special governmental units of limited purpose are not subject to the fair representation mandates. U.S.C.A. Const. Amends. 14, 15.

9. Constitutional Law Key 215

To establish existence of a constitutionally impermissible redistricting plan, the plaintiff must maintain the burden of showing either first, a racially motivated gerrymander, or a plan drawn along racial lines, or second, that, designedly or otherwise, an apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. U.S.C.A. Const. Amends. 14, 15.

10. Counties Key 38

A reapportionment plan may not be invalidated solely because of the racial motivations of those who fashioned it; focus is on actual effect of the legislation being challenged and not the reason why the legislation was enacted. U.S.C.A. Const . Amends. 14, 15.

11. Constitutional Law Key 225(1)

At-large and multimember districting schemes are not per se unconstitutional; nevertheless, where a petitioner can demonstrate that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice, such districting schemes are constitutionally infirm. U.S.C.A. Const. Amends, 14, 15.

12. Constitutional Law Key 215

It is not enough, to establish dilution of voting strength of racial or political elements by use of at-large and multimember districting schemes, to prove a mere disparity between the number of minority residents and the number of minority representatives. U.S.C.A. Const. Amends. 14, 15.

13. Constitutional Law Key 215

Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that use of a multimember districting scheme is rooted in a strong state policy divorced from maintenance of racial discrimination, a holding of no dilution of minority voting strength is required; however, such a holding is not mandated where the state policy favoring multimember or at-large districting schemes is rooted in racial discrimination. U.S.C.A. Const. Amends. 14, 15.

14. Constitutional Law Key 215

Where a minority can demonstrate a lack of access to the

process of slating candidates, unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multimember or at-large districting, or that existence of past discrimination in general precludes the effective participation in the election system, a strong case of dilution of voting strength has been made. U.S.C.A. Const. Amends. 14, 15.

15. Constitutional Law Key 215

Standards governing dilution of voting strength of racial or political elements of voting population by use of at-large or multimember districting scheme are applicable whether it is specific law or a custom or practice which causes the diminution of minority voting strength. U.S.C.A. Const. Amends. 14, 15.

16. Constitutional Law Key 215

Proof of dilution of minority voting strength by use of at-large and multimember districting scheme is enhanced by a showing of existence of large districts majority vote requirements, anti-single shot voting provisions and lack of provision for at-large candidates running from particular geographical subdistricts; fact of dilution is established on proof of existence of aggregate of such factors; however, all such factors need not be proved in order to obtain relief. U.S.C.A. Const. Amends. 14, 15.

17. Counties Key 38

Schools and School Districts Key 52

Repudiation of at-large elections for police juries and school board members was warranted where minority residents had suffered from protracted history of racial discrimination touching their ability to participate in electoral process, for years they had been compelled by statute of statewide application to attend racially segregated schools, voters had been subject to statewide interpretation test to qualify to vote and for 40 years

no blacks had been permitted to register to vote; removal of such impediments did not vitiate significance of showing of past discrimination since debilitating effects thereof persisted, particularly in fact that although blacks comprised a majority of population they constituted a minority of registered voters. U.S.C.A. Const. Amends. 14, 15.

18. Counties Key 38
Schools and School Districts Key 52
Absence of proof that representatives of police juries and school boards in parish were particularly insensitive to interests of minority residents was significant but not decisive of dilution of minority voting strength by at-large election of police juries and school board. U.S.C.A. Const. Amends. 14, 15.

19. Counties Key 38
Schools and School Districts Key 52
Fact that three black candidates had been successful in at-large election of parish jurors and school board did not require finding that the at-large plan did not dilute black vote where results of election were not before district court when it rendered reapportionment opinion; also, success of black candidates at polls did not necessarily foreclose possibility of dilution of the black vote since such success might be attributable to work of politicians apprehending that support of black candidate would be politically expedient or that election of black candidate would thwart successful challenges to electoral schemes on dilution grounds. U.S.C.A. Const. Amends. 14, 15.

20. Appeal and Error Key 169
An appellate court cannot take cognizance of matters not passed on by the trial court.

21. Constitutional Law Key 215
To hold that a minority candidate's success at the polls is conclusive proof of minority group's access to the political

process would be inviting attempts to circumvent the Constitution; showing of such success is not conclusive in a reapportionment case; rather, independent consideration of record is required. U.S.C.A. Const. Amends. 14, 15.

22. Counties Key 38
Where district court reapportionment plan approving at-large elections is challenged merely as an abuse of discretion, starting point of Court of Appeals is pronouncement of United States Supreme Court that single-member districts are preferable to large multimember districts; such preference is not, however, an unyielding one. U.S.C.A. Const. Amends. 14, 15.

23. Counties Key 38
Preference for single-member election district may yeild in two situations: first, where a district court determines that significant interests would be advanced by use of multimember districts and use of single-member districts would jeopardize constitutional requirements; however, those significant interests must not themselves be rooted in racial discrimination and, second, where a district court determines that multimember districts afford minorities a greater opportunity for participation in the political processes than do single-member districts; in process of making the latter determination, a court need not be oblivious to the existence and location of minority voting strength. U.S.C.A. Const. Amends. 14, 15.

24. Counties Key 38
It is permissible for a federal court to consider race in exercising its broad equitable powers to fashion a reapportionment decree. U.S.C.A. Const. Amends. 14, 15.

25. Counties Key 38
While not required to formulate a reapportionment plan that assures success of a minority at the polls, a court may in its discretion opt for a multimember plan which enhances the

opportunity for participation in the political processes. U.S.C.A. Const. Amends. 14, 15.

Stanley A. Halpin, Jr., Debra A. Millenson, George M. Strickler, Jr., New Orleans, La., for intervenor-appellant.

Frank R. Parker, Lawyers' Committee for Civil Rights Under Law, George Peach Taylor, Jackson, Miss., David Tatel, Lawyers' Comm., for Civil Rights Under Law, Washington, D.C., for amicus curiae.

William J. Guste, Jr., Atty. Gen. of La., Baton Rouge, La., William B. Ragland, Jr., Lake Providence, La., for defendants-appellees.

Before JOHN R. BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

GEWIN, Circuit Judge:

Aristotle has written:

> If liberty and equality, as is thought by some, are chiefly to be founded in democracy, they will be best attained when all persons alike share in the government to the utmost. 1/

This case evokes a consideration of the extent to which the Constitution of the United States compels adherence to this principle. Specifically, we are called upon to determine under

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1/ Aristotle, Politics, Book II.

what circumstances an apportionment scheme operates to minimize or cancel out the voting strength of racial or political elements of the voting population. 2/ Appellant contends that the district court order, affirmed by a majority of a panel of this court, 457 F. 2d 1381, requiring reapportionment for the school board and police juries in East Carroll Parish 3/ under an at-large scheme of elections cannot pass muster under the aforementioned standard. Both the district court and a majority of a panel of this court held that an at-large scheme cannot work a dilution of black voting strength where blacks, though constituting a minority of registered voters, comprise a majority of the total population of the parish. 4/ Upon rehearing en banc, this court finds the aforementioned conclusion infirm, and therefore we vacate and remand the district court's judgment.

I.

The panel opinion, recounting the facts which spawned this litigation and the protracted proceedings which it entailed, obviates the need for a full exposition of the present posture of

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2/ White v. Regester, 412 U.S. 755, 765, 93 S. Ct. 2332, 2339, 37 L. Ed. 2d 314, 324 (1973); Whitcomb v. Chavis, 403 U.S. 124, 143, 91 S Ct. 1858, 29 L Ed. 2d 363 (1971); Fortson v. Dorsey, 379 U.S. 433, 439, 85 S. Ct. 498, 13 L. Ed. 2d 401 (1965); Burns v. Richardson, 384 U.S. 73, 88, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966).

3/ In the absence of special legislative authority for school boards to apportion, the apportionment and reapportionment of parish school boards is dependent upon such apportionment of the police jury in the parish. Consequently, this case does not require a distinction between the reapportionment scheme as it affects either body.

4/ As shall be discussed *infra*, a majority of the panel refrained from announcing a per se rule. Rather, it qualified it application of the majority of population standards on the grounds proffered by appellees, namely the size of the parish.

this case. Consequently, we shall highlight only those facts particularly germane to our disposition.

East Carroll is a rural parish located in the extreme northeast corner of Louisiana. According to the 1970 census, it has a population of 12,884, of which 7,568, or 58.7% are black. Until recently, blacks in the parish, like all blacks in Louisiana, suffered form the maintenance of dual school systems, and the interposition of an interpretation test which preconditioned qualification for voting. Additionally, form 1922 to 1962, no black resident of the Parish had been permitted to register to vote. With the removal of state and locally imposed impediments to voting, and through the efforts of federal registrars, registration statistics in the parish canged dramatically. As of October 6, 1971, there were 3,342 whites and 777 blacks registered on the East Carroll rolls and an additional 2,122 federally registered black voters in the parish. 5/ Concurrent with the increased registration of black voters, elections under the predecessor ward system produced two black members of the policy jury and one black school board member.

The change from ward to at-large elections challenged herein was produced by the entry in 1968 of a district court order in a suit where petitioners sought to insure fidelity to the one-man, one-vote principle of Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Three years elapsed between the entry of this order and the renewal of proceedings precipitated by instructions issued by the district court that

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5/ These figures are based on the 1962 findings of the district court in the voter registration suit brought in the Parish, United States v. Manning, 205 F. Supp. 172 (W.D. La. 1962), and on the State of Louisiana Board of Registration, Report of Registered Voters, month ending October 6, 1971. *See* Brief of Appellant at 3, Zimmer v. McKeithen, No. 71-2649 (5th Cir. filed Dec. 1, 1971); Brief of Appellee at 1, *id.* (5th Cir. filed March 28, 1972)

East Carroll submit a reapportionment plan in light of the 1970 census. Pursuant to these instructions, the Parish Police Jury resubmitted the 1968 at-large plan for approval. Subsequently, appellant Marshall was permitted to intervene on behalf of himself and all other similarly situated black voters in East Carroll, and challenge the propriety of the at-large plan as contravening the fourteenth and fifteenth amendments of the Constitution and Section 5 of the Voting Rights Act of 1965. 6/ After the hearing conducted on July 29, 1971, the district court found, *inter alia*, that since under the at-large plan, there was a zero population deviation, the at-large plan did not dilute the voting strength of the black population. Accordingly, the district court ordered that police jury and school board elections be conducted pursuant to an at-large scheme of voting under which the parish was divided into 7 wards. Under this scheme, 6 of the wards were to elect 1 representative to the police jury and school board, and 1 ward was to elect 3 representatives. Although candidates were required to reside in the ward from which they sought election, they were to be voted upon by registered voters in the entire county.

Marshall urged several grounds for reversal on appeal: first, that the district court was without power to order at-large elections because under Section 5 of the Voting Rights Act of 1965, the Attorney General of the United States had tendered an objection to the Louisiana Statutes which prescribed at-large elections for police juries and school boards; 7/ second,

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6/ Although Marshall clearly raised the Voting Rights Act issue in his Complaint in Intervention, the district court in its order in 1971 did not rule on this issue. Since he preserved this contention on appeal, it was before a panel of this court.

7/ Until 1968, Louisiana law prohibited at-large elections for School Boards and Police Juries (the law required at least five wards from which the members of these bodies were to be elected). By Louisiana Acts of 1968 No. 445 Section 1 (amending La. R.S 33:1221) and No. 561 (adding La. R.S. 17:71.1—17:716), Louisiana Law was amended to allow

that the district court applied and improper legal standard in evaluating dilution; and third, that the district court was clearly erroneous in finding that at-large elections do not dilute the voting strength of black voters in the parish. All three contentions were rejected by the panel. 8/

[1, 2] On rehearing, Marshall challenged the panel's disposition on all three grounds. Since we find his last two challenges meritorious, we need not consider his first contention concerning Section 5 of the Voting Rights Act of 1965. 9/

7/ (Continued)
at-large elections (or elections from less than five wards) for School Boards and Police Juries.

On April 29, 1969, Acts 445 and 561 were submitted to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act. of 1965, 42 U.S.C. § 1973c. On June 26, 1969, both Acts were rejected as having "the effect of discrimination against Negro voters on account of their race, and of denying to them an effective voice in the selection of Police Jury and School Board members." On September 10, 1969 this rejection was reaffirmed by the Attorney General of the United States, citing as a specific example of racial discrimination, the at-large scheme of elections in East Carroll Parish.

8/ In all deference to the panel, we submit that they failed to give adequate consideration to Marshall's contention that the district court's finding of no dilution was clearly erroneous.

9/ Marshall contended that the rule of Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L. Ed. 2d 268 (1971) and Sheffield v. Itawamba County Board of Supervisors, 439 F. 2d 35 (5th Cir. 1971) that court ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by Section 5 is inapposite where such plans are adopted by a court in "sweetheart" awsuits. Although there may be merit in his contention that the failure to qualify *Connor* and *Sheffield* may result in the circumvention of the Voting Rights Act, we would merely note that the dilution standard is a viable means of reconciling the disparate treatment of governmental body approved plans and court approved plans under Section 5. Furthermore, since Section 5, 42 U.S.C.

II

Before proceeding further, we feel it is important to emphasize the posture in which the issues are presented in the instant case. The panel understood Marshall to contend that the district court abused its discretion in adopting a plan that did not comport with *Connor v. Johnson*, 402 U.S. 690, 91 S.Ct. 1760, 29 L. Ed. 2d 268 (1971). We do not understand Marshall to make this contention. Consequently, we need not consider whether, absent an allegation that an at-large scheme unconstitutionally dilutes the voting strength of a minority the district court's approval of an at-large scheme would amount to an abuse of discretion under *Connor*.

Marshall's contention here is that the judicially approved at-large plan is unconstitutional, 10/ not merely indiscrete. Having identified Marshall's contention we turn to a consideration of first, the proper standard for testing dilution, and second, whether the district court erred in finding that there was no dilution in the instant case.

[3] We begin by noting that the concept of population in fair representation cases is not possessed of any talismanic quality. The Supreme Court recently affirmed this proposition in Gaffney v. Cummings, where it stated that "if it is the weight of a person's vote that matters, total population – even if stable and accurately taken – may not actually reflect that body of voters whose votes must be counted and weighed for purposes

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9/ (Continued)
§ 1973c (1970), covers attempts to administer voting practices as well as attempts to enact them. *see* Roman, Section 5 Of The Voting Rights Act: The Formation of an Extraordinary Legal Remedy, 22 Am. U.L. Rev. 111, 124 (1972), the panel's decision that *Connor* and *Sheffield* govern is quite appropriate.

10/ A similar contention was made in Gunderson v. Adams, 328 F. Supp. 584 (S.D. Fla. 1970) aff'd, 403 U.S. 913, 91 S. Ct. 2225, 29 L. Ed. 2d 692 (1971) where a Florida plan codifying a court ordered plan, was

of reapportionment, because 'census persons' are not voters." 11/ Indeed Reynolds v. Sims, *supra* and its progeny 12/ marked a departure from statistical niceties. Consequently, to rely upon population statistics, to the exclusion of all other factors, is to give these statistics greater sanctity than that which the law permits or requires.

[4,5] More fundamentally, the application of the population measure to this case is premised upon a misunderstanding of the thrust of the dilution problem presented in this case. Inherent in the concept of fair representation are two propositions: first, that in apportionment schemes, one man's vote should equal another man's vote as nearly as practicable; 13/

10/ (continued)
challenged and upheld.

11/ Gaffney v. Cummings, 412 U.S. 735-746, 93 S.Ct. 2321, 2328, 37 L.Ed. 2d 298, 308 (1973). Thus, census figures include aliens, nonresident military personnel, nonresident students, all of whom may be ineligible to vote. The Supreme Court and lower courts have approved apportionment based not on population but on voter registration statistics on several occasions, where such data produces a distribution of legislators not differing substantially from the use of a permissible population basis. *See, e.g.*, Burns v. Richardson, *supra*, 384 U.S. at 93, 86 S. Ct. 1286; Ely v. Klahr, 403 U.S. 108, 91 S. Ct. 1803, 29 L.Ed. 2d 352 (1971); Reynolds v. Gallion ex rel. Attorney General of Alabama, 308 F. Supp. 803 (M.D. Ala. 1969); Pate v. El Paso County, Texas 337 F. Supp. 95 W.D. Texas) aff'd, 400 U.S. 806, 91 S. Ct. 55, 27 L.E. 2d 38 (1970).

12/ E.g., Gaffney v. Cummings, *supra:* White v. Regester, *supra*; Mahan v. Howell, 410 U.S. 315, 93 S. Ct. 979, 35 L. Ed. 2d 320 (1973); Abate v. Mundt, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed. 2d 399 (1971); Swann v. Adams, 385 U.S. 440, 87 S. Ct. 569, 17 L. Ed. 2d 501 (1967).

13/ Reynolds v. Sims, *supra*, 377 U.S. at 577, 84 S.Ct., at 1389.

and second that assuming substantial equality, the scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population. Both the Supreme Court and this court have long differentiated between these two propositions. 14/ And although population is the proper measure of equality in apportionment, in Whitcomb v. Chavis, 403 U.S. 124, 149-150, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971) and White v. Regester, *supra*, 412 U.S. at 765, 93 S. Ct. at 2339, 37 L. Ed. 2d at 324, the Supreme Court announced that access to the political process and not population was the barometer of dilution of minority voting strength.

[6] The district court applied a per se rule that since blacks were a majority in East Carroll Parish, the at-large plan could not possibly submerge their vote. Since in White v. Regester, *supra*, the Supreme Court affirmed a district court's finding of dilution in Bexar County even though Mexican-Americans comprised a numerical majority of the population in that county, the per se rule applied by the district court below cannot withstand scrutiny. The panel also relied upon the fact that blacks in East Carroll comprised a majority of population in reaching its conclusion, but pointing to the size of the parish's population, it qualified the standard applied by the district court.

14/ See Gaffney v. Cummings, *supra*, 412 U.S. at 751, 93 S. Ct. at 2330, 37 L.Ed. 2d at 311; White v. Regester, *supra*, 412 U.S. at 765, 93 S. Ct. at 2339, 37 L. Ed. 2d at 324; Whitcomb v. Chavis, *supra*, 403 U.S. at 142, 91 S. Ct. 1858, 29 L. Ed. 2d 363; Abate v. Mundt, *supra*, 403 U.S. at 184 n.2, 91 S. Ct. 1904; Burns v. Richardson, *supra*, 384 U.S. at 88-89, 86 S.Ct. 1286; Howard v. Adams County Board of Supervisors, 453 F. 2d 455, 457 (5th Cir. 1972) cert. denied, 407 U.S. 925, 92 S. Ct. 2461, 32 L. Ed. 2d 812 (1972). *See also* Troxler v. St. John the Baptist Parish Police Jury, 331 F. Supp. 222 (E.D. La. 1971), appeal dismissed, 452 F. 2d 1388 (5th Cir. 1972).

We feel that this qualification, invoked to differentiate the instant case from Connor v. Johnson, 402 U.S. 690, 692, 91 S. Ct. 1760, 29 L. Ed. 2d 268 (1971) where the Supreme Court announced a preference for single-member districts in "large" districts, is of no moment where, as here, a showing of dilution has been made. The legal standards announced by the Supreme Court in Whitcomb v. Chavis, *supra*, and White v. Regester, *supra* in determining submergence admit of no distinction on the basis of size of population alone.

[7,8] Concededly, in Whitcomb v. Chavis, *supra*, 403 U.S. at 143-144, 91 S. Ct. 1858, the Supreme Court acknowledged that the aggregation of several districts into multi-member districts or an at-large scheme may enhance the potential for dilution when the population of such districts is large. But just as the magnitude of the districts did not obviate the need for petitioners to satisfy their burden of proof in *Whitcomb*, the minuteness of the population in the instant case cannot be invoked to pretermit further inquiry into the possibility of dilition in East Carroll Parish. The import attributed to population by the majority of the panel had this preclusive effect. However, we cannot sanction the view that minorities are to be exposed and subject to apportionment schemes otherwise constitutionally infirm because the equal protection clause can be watered down on the basis of population statistics alone. 15/

[9,10] We also hold that the district court erred in finding that the at-large plan did not dilute the black vote in East Carroll. In Howard v. Adams County Board of Supervisors,

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15/ We acknowledge, however, that elections with respect to certain special governmental units of limited purpose are not subject to the fair representation mandates. See Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743, 93 S. Ct. 1237, 35 L. Ed. 2d 675 (1973); Salyer Land Company v. Tulare Lake Basin Water Storage District, 410 U. S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973).

supra, 453 F. 2d at 457, this court stated that to establish the existence of a constitutionally impermissible redistricting plan, plaintiffs must maintain the burden of showing either first, a racially motivated gerrymander, or a plan drawn along racial lines, or second, that " . . . designedly or otherwise, a[n] . . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. " In view of our holding that Marshall satisfied the burden with respect to the second standard, we need not entertain his contention that the departure from the firmly entrenched state policy against at-large voting in elections in police juries and school boards comes within the first standard. 16/

[11] It is axiomatic that at-large and multi-member dis-

16/ Similar contentions have met with varying degrees of success. For cases upholding the claim that a reapportionment plan was racially discriminatory, see Gomillion v. Lightfoot, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960); Smith v. Paris, 257 F. Supp. 901, 904 (M.D. Ala.) modified and aff'd. 386 F.2d 979 (5th Cir. 1967) on remand, United States v. Democratic Executive Committee of Barbour County, Alabama, 288 F. Supp. 943 (M.D. Ala. 1968); Sims v. Baggett, 247 F. Supp. 96, 110 (M.D. Ala. 1965). For cases in which such a claim was rejected, see Wright v. Rockefeller, 376 U.S. 52, 84 S. Ct. 603, 11 L. Ed. 2d 512 (1964); Holt v. Richmond, 459 F. 2d 1093 (4th Cir.)., cert. denied, 408 U.S. 931, 92 S. Ct. 2510, 33 L. Ed. 2d 343 (1972).

Neither the language quoted from Howard v. Adams County Board of Supervisors, *supra*, nor the aforementioned cases should be read to hold that a reapportionment plan can be invalidated solely because of the racial motivations of those who fashioned it. In Palmer v. Thompson, 403 U.S. 217, 224-225, 91 S. Ct. 1940, 29 L. Ed. 2d 438 (1971) the Supreme Court stated that although in past decisions contain language which sugests that motive or purpose behind a law is relevant to its constitutionality, these decisions, including Gomillion v. Lightfoot, 334 U.S. 339, 347, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960) focused on the actual effect of the legislation being challenged, and not the reason why the legislation was enacted.

tricting schemes are not per se unconstitutional. 17/ Nevertheless where the petitioner can demonstrate that "its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice, " White v. Regester, *supra*, 412 U.S. at 766, 93 S. Ct. at 2339, 37 L. Ed. 2d at 324, Whitcomb v. Chavis, *supra*, 403 U.S. at 149-150, 91 S. Ct. 1858, such districting schemes are constitutionally infirm.

[12-16] The Supreme Court has identified a panoply of factors, any number of which may contribute to the existence of dilution. Clearly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives. 18/ Where it is apparent that a minority is afforded the opportunity to participate in the slating of candidates to represent its area, that the representatives slated and elected provide representation responsive to minority's needs, and that the use of a multi-member districting scheme is rooted in a strong state policy divorced from the maintenance of racial discrimination, Whitcomb v. Chavis, *supra*, would require a holding of no dilution. *Whitcomb* would not be controlling, however, where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. 19/ Conversely, where a minority can demonstrate a lack of access to the process of slating candidates 20/ the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a stong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts 21/ The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in White v. Regester, *supra*, demonstrates, however, that all these factors need not be proved in order to obtain re"ef.

[17] In *White*, the Supreme Court sustained the district court's invalidation of a nulti-member districting scheme for

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17/ White v. Regester, *supra*, 412 U.S. at 751 93 S. Ct. at 2339, 37 L. Ed. 2d at 324; Mahan v. Howell, *supra*, 410 U.S. at 335, 93 S. Ct. 979; Ferrell v. Hall, 339 F. Supp. 73 (W. D. Okl.) aff'd, 406 U.S. 939, 92 S. Ct. 2045, 32 L. Ed. 2d 328, petition for rehearing denied, 408 U.S. 932, 92 S. Ct. 2489, 33 L. Ed. 2d 344 (1972); Gunderson v. Adams 328 F. Supp 584 (S. D. Fla. 1970); aff'd, 403 U.S. 913 92 S. Ct. 2225, 29 L. Ed. 2d 692 (1971): Duesch v. Davis, 387 U.S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656 (1967); Kilgarlin v. Hill, 386 U.S. 120, 121, 87 S. Ct. 820, 17 L. Ed. 2d 771 (1967); Burns v. Richardson, *supra*, Fergeson v. Dorsey, *supra*; Lipscomb v. Johnson,459 F. 2d 335, 337 (5th Cir. 1972); Howard v. Adams County Board of Supervisors, *supra*, 453 F. 2d at 457-458.

18/ *E.g.*, Whitcomb v. Chavis, *supra*, at 149, 91 S. Ct. 1858; Lipscomb v. Johnson, *supra*, 459 F. 2d at 337.

19/ Taylor v. McKeithen, 407 U.S. 191, at 194, 92 S. Ct. 1980, at 1982, 32 L. Ed. 2d 648, at 650, n.3. *see* Parker, County Redistricting in Mississippi: Case Studies in Racial Gerrymandering, 44 Miss. L. J. 391, 400 (1973).

20/ The Supreme Court's focus in Whitcomb v. Chavis, *supra*, 403 U.S. at 149-150, 91 S. Ct. 1858, on the access of minorities to slating procedures in Marion County, Indiana, makes clear that the standards we enunciate today are applicable whether it is a specific law or a custom or practice which causes the diminution of minority voting strength.

21/ Compare Whitcomb v. Chavis, supra, 403 U.S. at 143-144, 91 S. Ct. 1858, 29 L. Ed. 2d 363, with Graves v. Barnes, 343 F.Supp. 704, 725 (W.D. Tex. 1972), aff'd sub nom. White v. Regester, *supra*. The existence and mode of operation of voting procedures which enhance dilution is outlined in Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 553-55 and accompanying notes (1973).

the election of representatives to the Texas House of Representatives from Dallas and Bexar Counties. The Court held that the following findings of fact made by the district court concerning Dallas County were sufficient to warrant the relief fashioned: first, that the blacks had suffered a history of official racial discrimination which touched their right to participate in democratic processes; second, that the Texas requirements for majority vote as a prerequisite to nomination in a primary, though not themselves improper, enhanced the opportunity for racial discrimination; and third that black candidates had merely nominal success in the past in electing Representatives due to the indifference of the Democratic Party which controlled candidate-slating in Dallas County. White v. Regester, *supra*, 412 U.S. at 766-767, 93 S. Ct. at 2339-2340, 37 L. Ed. 2d at 324-325. With respect to Bexar County, the district court made similar findings concerning the history of discrimination against Mexican-Americans and the unresponsiveness of the Bexar County legislative delegation to the interests of Mexican-Americans. The Supreme Court held that the District Court's findings were sufficient to sustain the relief awarded in Bexar County. White v. Regester, *supra*, 412 U.S. at 767-769, 93 S. Ct. at 2340-2341, 37 L. Ed. 2d at 325-326. While the instant case is not on all fours with White v. Regester, we hold that the record reveals facts sufficiently within its purview to warrant a repudiation of at-large elections in East Carroll Parish.

As in Dallas and Bexar Counties, minority residents in East Carroll Parish have suffered from a protracted history of racial discrimination which touched their ability to participate in the electoral process. Until 1957, they were compelled by a statute of statewide application to attend racially segregated schools until this court took action in Orleans Parish School Board v. Bush, 242 F. 2d 156 (5th Cir.), cert. denied, 354 U.S. 921, 77 S. Ct. 1380, 1 L. Ed. 2d 1436 (1957). Less overt but equally invalid statewide schemes which fostered the maintenance of dual schools were operative until thwarted in

1960 [22] Until 1965, voters in East Carroll were subject to a state-required interpretation test in order to qualify to vote.[23] Finally, from 1922 to 1962, no black had been permitted to register to vote in the Parish [24] Concededly, these impediments to participation in the electoral process have since been removed. The district court concluded that their removal vitiated the significance of the showing of past discrimination. This conclusion is untenable, however, precisely because the debilitating effects of these impediments do persist. *Cf.* Graves v. Barnes, 343 F. Supp. 704, 733 (W.D. Texas 1972), aff'd sub nom. White v. Regester, *supra*. Their persistence is manifested, in part, by the fact that although blacks in East Carroll comprise a majority of the population, they constitute a minority of registered voters.

Similarly, as in Dallas and Bexar Counties, the electoral device of a majority voting requirement is operative in East Carroll Parish,[25] This device has been severely criticized as tending to submerge a political or racial minority. Graves v. Barnes, *supra* at 725, aff'd sub nom. White v. Regester, *supra*. See also Evers v. State Board of Election Com'rs, 327 F. Supp. 640, 643 (S. D. Miss. 1971). This criticism is appropriate in

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22/ See *e.g.*, Bush v. Orleans Parish School Board, 188 F. Supp. 916, 920 (E.D. La. 1960) (documenting additional circumventive artifices).

23/ Louisiana v. United States, 380 U.S. 145, 85 S. Ct. 817, 13 L. Ed. 2d 709 (1965).

24/ United States v. Manning, *supra*.

25/ La. Rev. Stat. Ann. art. 18 § 18:358 (1969). in addition, voters in East Carroll are subject to anti-single shot voting requirements, the effects of which though mitigated as to wards 1, 2, 4, 5, 6 and 7 under the district court's plan, are still egregious in ward 3 where 3 representatives to the police jury and school board are elected. *See* La. Rev. Stat. Ann. art. 18, § 18:351 (1969).

the instant case.

[18] The only distinction between the instant case and White v. Regester, *supra*, is that here, there is no proof that representatives of police juries and school boards in East Carroll were particularly insensitive to the interests of minority residents. While this distinction is significant, it is not decisive.26/

We feel that this deficiency in proof is compensated for by an additional distinction between the circumstances in the instant case and *White*. In Dallas and Bexar Counties, there was a strong tradition of multi-member districting. In contrast, in East Carroll, the firmly entrenched state policy against at-large elections for police juries and school boards had persisted until as late as 1967. Moreover, although testimony elicited by the district court emphasized the fact that the problems confronting the police jury were parish-wide and hence could best be resolved by representatives sensitive to a parish-wide electorate, there is a dearth of evidence that would suggest that the police jury formerly elected by wards inadequately served parish-wide interests in the past. Indeed, we find it rather anomalous that appellees would contend that the parish is too small for there to be a dilution of minority votes under an at-large scheme, and yet too large for ward elected representatives to be responsive to parish-wide interests.

26/ It may be that the absence on the record of any criticism of the responsiveness of the police jury and school board is attributable to an omission of proof. If so, our decision should not be interpreted as acquiescing to such omissions. However, it may be that the particular functions of the police jury, for example, do not easily lend themselves to unresponsive representation. The record establishes that the primary function of the juries is the drainage of rural farmlands maintenance of rural roads, and the overseeing of a prison farm. Were we to hold that the absence of a claim of representation unresponsive to a minority's needs foreclosed constitutional attack, the voting strength of minorities could be freely diluted without fear of constitutional restraint. The absence of proof with respect to school boards could not be explained on such grounds.

Thus, on the basis of the evidence adduced on the record, we feel constrained to find that the district court erred in rejecting Marshall's contention that the at-large electoral scheme would work a diminution of the black voting strength in East Carroll Parish. The confluence of factors presented in the instant case bring it well within the Supreme Court's holding in White v. Regester, *supra*.

[19-21] Although the aforementioned analysis suffices to sustain our disposition, we are inclined to respond to an additional argument tendered by appellee in support of the panel's ruling. While acknowledging that the instant facts might theoretically present a case of dilution, appellee argued that 1971 and 1972 elections under the at-large plan, with the attendant success of 3 black candidates, dictated a finding that the at-large scheme did not in fact dilute the black vote. The significance attached to success at the polls in the instant case is unavailing, however, for two reasons. First, these results were not before the district court when it rendered the opinion we are presently reviewing. It is axiomatic that an appellate court cannot take cognizance of matters not passed upon by the trial court. Second, we cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. Such success might, on occasion, be attributable to the work of politicians, who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations-namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. In either situation, a candidate could be elected despite the relative political backwardness of black residents in the electoral district. Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process. we would merely be inviting attempts to circumvent the Constitution. This we choose not to do. Instead, we shall continue to require an independent consideration of the record.

III

[22-25] We conclude our analysis in this case by returning to the point at which we began when we noted that this is not a case wherein a district court reapportionment plan approving at-large elections is challenged merely as an abuse of discretion. Where such a challenge is registered, our starting point would be Connor v. Johnson, *supra*, in which the Supreme Court announced that single-member districts are preferable to large multi-member districts. This preference is not, however, an unyielding one. As the Supreme Court admonished in Whitcomb v. Chavis, *supra*, 403 U.S. at 161, 91 S. Ct. at 1878, 29 L. Ed. 2d 363, "[t] he remedial powers of an equity court must be adequate to the task, but they are not unlimited." Lest our decision today be misconstrued to narrowly circumscribe the discretion of a district court in fashioning a reapportionment plan itself free from constitutional infirmity, we would note that the preference for single-member districts may yield in two situations.

Where a district court determines that significant interests would be advanced by the use of multi-member districts and the use of single-member districts would jeopardize constitutional requirements, it can employ multi-member districts. *See* Mahan v. Howell, *supra*, 410 U.S. at 334-335, 93 S.Ct. 979, 35 L. Ed. 2d 320. But these significant interests mut not themselves be rooted in racial discrimination. *Cf.* Taylor v. Mc Keithen, *supra*, 407 U.S. at 194, 92 S. Ct. at 1982, 32 L. Ed. 2d at 650 n. 3; White v. Weiser, 412 U. S. 783, 796, 93 S. Ct. 2348, 2355, 37 L. Ed.2d 335, 347 (1973).

The preference may also yield where a district court determines that multi-member districts afford minorities a greater opportunity for participation in the political processes than do single-member districts. In the process of making such a determination, a court need not be oblivious to the existence

and location of minority voting strength.[27] While not required to formulate a plan that assures the success of a minority at the polls, a court may in its discretion opt for a multi-member plan which enhances the opportunity for participation in the political processes.

We acknowledge that the legal standards fashioned in this area of the law require federal courts to engage in a particularly

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[27] The Supreme Court has never ruled on the question of the extent to which the board equitable powers of a federal court in fashioning reapportionment decrees are limited by the colorblind concept of Gomillion v. Lightfoot, *supra* and Wright v. Rockefeller, *supra*. *See* Taylor v. McKeithen, *supra*, 407 U.S. at 194, 92 S. Ct. at 1982, 32 L. Ed. 2d at 650. Several courts have intimated that the colorblind concept is in fact a limitation. *See* Mann v. Davis, 245 F. Supp. 241, 245 (E.D. Va.) aff'd sub nom. Burnette v. Davis, 382 U.S. 42, 86 S. Ct. 181, 15 L. Ed. 2d 35 (1965); Ferrell v. Hall, 339 F. Supp. 73, 83 (W.D. Okla.) aff'd, 406 U.S. 939, 92 S. Ct. 2045, 32 L. Ed. 2d 328; rehearing denied, 408 U.S. 932, 92 S. Ct. 2489, 33 L. Ed. 2d 344 (1972).

In discussing the remedial power of federal courts to fashion reapportionment decrees, the Court has cited Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), *see, e.g.*, Taylor v. McKeithen, *supra*, 407 U.S. at 194, 92 S. Ct. at 1982, 32 L. Ed. 2d at 650; Sixty-Seventh Minnesota State Senate v. Beens, *infra*, 406 U.S. at 201, 92 S. Ct. at 1486, 32 L. Ed. 2d at 12 (Stewart, J., dissenting), thereby suggesting that such powers in fashioning reapportionment decrees are coterminous with those in fashioning desegregation decrees. Since *Swann* noted that it was permissible for a federal court to consider race in the latter situation, *Swann*, *supra*, 402 U.S. at 25, 91 S. Ct. 1267, it would also be permissible to consider race in the former situation.

Our decision in Howard v. Adams County Board of Supervisors, *supra* is not inconsistent with the view maintained herein. In Howard, we observed that the district court was correct in noting that the organization commissioned by the legislature to draw up reapportionment plans did not consider race in its plan. Howard, *supra*, 453 F. 2d at 458. We did not intimate any view as to the propriety of considering race in such circumstances.

exacting and hazardous inquiry in order to divine the proper remedial action to be taken, Justice Stewart presaged what we today acknowledge in his dissent in Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 204, 92 S. Ct. 1477, 1487, 32 L. Ed. 2d 1, 14 (1972), when he noted that "the federal courts are often going to be faced with hard remedial problems" in reapportionment cases. Nevertheless, we are confident that federal courts can come to grips with such problems.

For the reasons set forth above, we reverse the decision of the panel of this court and vacate and remand the judgment of the district court for proceedings consistent with our disposition.

COLEMAN, Circuit Judge, with whom INGRAHAM, Circuit Judge, joins (dissenting in part):

On November 17, 1972, a majority of the Judges ordered this case reheard en banc directing counsel to file through briefs on the issue of "dilution of the franchise of black voters" as raised in the District Court and considered by the panel decision. 1/ Clearly, what the en banc court intended to do was to establish some standards as to what is required to "minimize or cancel out black voting strength", 2/ particularly in the context of a sparsely settled governmental unit inhabited by less than 13,000 people.

With sincere deference, I fear that the intended objective has

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1/ The panel opinion in this case (Judge Gewin dissenting in part) is reported, 467 F. 2d 1381.

2/ Burns v. Richardson, 384 U.S. 73, 86 S. Ct. 1286, 16 L. Ed. 2d 376; Fortson v. Dorsey, 379 U.S. 433, 85 S. Ct. 498, 13 L. Ed. 2d 401.

eluded the en banc opinion. Regretfully, it leaves me with no plainly discernible idea of what the District Courts are hereafter to do with this troublesome problem. Moreover, I must disagree with the effect of those portions of the opinion which I think I do understand.

The opinion appears to be anchored, in the main, on the recent decision of the Supreme Court in White v. Regester, dealing with conditions prevailing as to the multi-member legislative districts in Dallas and San Antonio. East Carroll Parish, Louisiana, however, is a "far cry" from either of these highly populated metropolitan areas. The Parish Seat, Lake Providence, has a population of 6,183. The remaining 450 square miles of typical rural delta terrain have 6,701 inhabitants, with an average population density of fifteen persons (not voters) per square mile. In East Carroll blacks are in a heavily preponderant majority, not in the minority as were the blacks and Mexican-Americans in Dallas and San Antonio. In *White*, the Supreme Court considering the *totality of the circumstances*, was not inclined to disturb the findings of the Three Judge District Court that certain conditions in the cities had led to invidious discrimination against the minority groups. In the instant appeal, the en banc majority holds a non-cancellation, non-minimization finding of the District Court to be clearly erroneous.

Let us now turn to the undisputed facts in the case presently before us.

In round figures, the Parish population is 59% black and 41% white; the voting registration is 54% white and 46% black. *The record fails to reflect the number of eligible blacks who have chosen not to register.*

With a spread of only eight percentage points between white and black registration, even in an election conducted solely on

racial considerations a switch of less than five percent would reverse the expected outcome. Does such a *thin line*, even in a formerly segregated jurisdiction, amount as a matter of law to impermissible "minimization" or "cancellation" of black voting strength? I would respond in the negative, but the en banc opinion says "yes"; that any other view is clearly erroneous. Of course, divergencies of such size in constitutionally mandated population reapportionments at state and local levels do not call for per se invalidation, White v. Regester, *supra*.

One of the factors stressed in White v. Regester was that for nearly a hundred years only two minority representatives from Dallas County and only five Mexican-Americans from Bexar County had been elected to the Texas Legislature. I do not know how many had been candidates nor what qualifications they possessed, but in East Carroll the en banc opinion declines to consider the unchallenged fact that in the at-large elections in East Carroll Parish in 1971 and 1972 three black candidates were elected to office, including one who previously had been defeated when running in his own ward. The opinion holds that an appellate court cannot take cognizance of matters not passed upon by the trial court. It was all right for the Supreme Court to consider election results in Dallas and Bexar for the past one hundred years but when it comes to dismembering a little parish we must blind ourselves to facts asserted on oral argument and not in the least disputed. One rule for plaintiffs and the opposite for defendants. I might add that in the eight years I have served on this Court I have frequently seen it go outside the formal record in racially oriented cases for the reason that it would not blind itself to unchallenged facts.

Obviously, the election of three black candidates in at-large elections within two years after the adoption of the plan now under review, and at a time when black registration amounted to 46% and white registration came to 54%, pretty well explodes any notion that black voting strength has been cancelled

or minimized. What the en banc opinion condemns as clearly erroneous turns out to be clearly right when put to the test of actual use at the ballot box rather than in the rarified atmosphere of the judicial chamber.

Additionally, in White v. Regester, the at-large candidates for the legislature were not required to live in a particular zone, so that it was possible for every legislator to be elected from outside the minority areas. Indeed, the Three Judge Texas District Court felt impelled to say, and the Supreme Court quoted it, that these legislators were "insufficiently responsive to Mexican-American interests".

In East Carroll Parish, however, the candidates were required to run from specifically designated areas.

I believe that White v. Regester was decided on the denial of access to the political process, not on cancellation or minimization of the minority vote. In any event, a decision rendered on the facts peculiar to that case and not shown to exist in East Carroll provides faint precedential support for the en banc decision now about to be rendered.

In East Carroll Parish the black people hold a predominant population majority—59% to 41%. It necessarily follows that the opinion of the Court in this case can only mean that in formerly "segregated" areas a black population majority is of no consequence in one man-one vote reapportionment cases unless it is also matched by a black registration majority when there is an effort to escape from the pocket borough method of electing county officials. The basic requirement, the fundamental goal, of population equality must yield to registration equality.

I submit that this is a serious distortion of the one man-one vote principle. It has to be premised on the idea that voters

will always vote for candidates of their own race, an idea which has repeatedly failed the test of electoral experience, even in East Carroll Parish itself. It also overlooks the absolute certainty that with such a predominantly heavy population majority it is only a matter of time, and too long at that, when there will be a black registration majority in East Carroll.

The en banc opinion is quite inconclusive as to what the District Court must do on remand. Apparently, however, no choice is left but to direct the division of the Parish into wards (districts). The Balkan must be fragmented into nine Balkans. After it had lost jurisdiction in this case, as set forth in the panel opinion, the District Court approved a redistricting plan submitted by the plaintiff-appellants by which three of the nine board members would be elected from one ward while the other six wards would be allowed to elect only one each. One ward would elect 1/3 of the Board while the other six would elect 1/9 each. So far as ultimate power on the Board is concerned a vote in one ward would be worth exactly three times that of a vote in any other ward. To me that certainly smells of invidious discrimination and a complete distortion of the one man-one vote rule within a small county area.

The paramount consideration in this case is that in East Carroll Parish, Louisiana, the black race is a definite majority, not a minority. 3/ Thus, the ultimate question is whether a 7% deficit in black registration cancels or minimizes the black voting strength of those who hold an 18% advantage in population. The en banc opinion says that it does, as a matter of law, and that the affirmative finding of the District Court to the contrary is clearly erroneous.

3/ The en banc opinion speaks of single-shot voting, run-off elections, and slating candidates, but these were not issues in the court below.

Hence, we direct a change in the election machinery of a small rural parish, where the black officials elected under the old malapportioned ward plan expressed, as the record shows, a preference for the at-large plan.

I would adhere to what the panel said originally:

> "We are unable to see how at-large elections in this small parish could possibly discriminate against its black citizens. They have a commanding majority of the total population. This majority would participate in the election of not one but of every police juror and every school board member in the parish. Every elected official would thus be answerable to all black citizens of the entire parish. On a single-member district plan, if such can be devised, the voters would have a voice in the election of only one member on the policy jury or the school board. It would, therefore, be just as easy to say, in the exercise of discretion, that a single district plan in this parish would more clearly dilute the voting power of the blacks than would one in which every voter, black and white, has the same identical voice in the selection of not one, *but all* members of the elective body. As a matter of fact, the District Judge so found."

To the extent indicated, I respectfully dissent.

CLARK, Circuit Judge, with whom DYER, LEWIS R. MORGAN and RONEY, Circuit Judges, join (dissenting):

The majority bases its reversal of the District Court order now on appeal on two grounds: first, the District Court improperly relied on population statistics alone in evaluating the effect of the plan ordered implemented in diluting the voting strength of black citizens and second, the District Court finding of no dilution was clearly erroneous. With deference, I differ as to both grounds. Of more fundamental importance is my

disagreement with Part III of the majority opinion which creates a formula to test multimember district reapportionment plans for dilution of ethnic group voting strength. The tests laid down sweep too broadly and at least they are unnecessary in view of the clear exposition of the law in this field by the Supreme Court. For all of these reasons I respectfully dissent.

I.

White v. Regester announces the legal standard to be applied in this case as succinctly and cogently as it can be put. Omitting supportive citations, the Court stated:

> Plainly, under our cases, multimember districts are not *per se* unconstitutional when used in combination with single-member districts in other parts of the State.
>
> But we have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups. To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

The Supreme Court concluded that "on the totality of the circumstances" it would not overturn the findings of the District Court

> representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County

> multi-member district in the light of the past and present reality, political and otherwise.

The majority epitomizes the District Court's order as one which based its determination of nondilution solely on the fact that the requirement of at-large elections eliminated any population deviation between voting units. However, I read the order to have a broader foundation. At the hearing held to determine the effect of the 1970 census upon the District Court's previous 1968 order for at-large elections, six plans were submitted to the court by the governmental agenceis involved and by the black intervenor. None of these plans provided for single-member districts throughout the parish. Rather, they provided for various combinations of single and multi-member districts and for various forms of parish-at-large elections with geographical residency requirements for the candidates for various posts. The evidence adduced during this hearing delved into what dilution would be brought about by the intervenor's proposed plans as compared with the dilution that would result from a parish-at-large reapportionment plan. Both forms of plans were also compared to the population proportions which existed under the pre-1968 single-member ward system.

The District Court's decree now on appeal provided in pertinent part:

> . . . the court having considered all plans presented as well as all alternate plans proposed by the parties hereto, it has made the following finding of facts:
>
> 1. That according the the 1970 U.S. Census, East Carroll Parish has a total population of 12,884 persons of which number 7,568 are blacks and 5,306 are whites and other nationalities; that the black population of East Carroll Parish, Louisiana, comprises 58.7 percent of the total population.

2. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is more satisfactory than other plans presented because it offers a zero deviation while all other plans considered did not.

3. That the plan of reapportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board does not dilute nor discriminate against the black population as the new voting unit from which officers of the jury and the board are to be elected is comprised of 58.7 percent blacks, or a substantial majority of blacks, while other plans considered diluted the black population of different areas within the parish significantly greater than the plan offered by the jury and school board.

4. That the plan recommended by East Carroll Parish Police Jury and East Carroll Parish School Board has actually been in effect in East Carroll Parish since December 2, 1968, and the plan has not proved discriminatory against blacks.

5. That the plan represents the wishes of both public bodies, having been endorsed by two of the three black public officials now serving on these public bodies.

6. That the plan of apportionment offered by East Carroll Parish Police Jury and East Carroll Parish School Board is a constitutionally acceptable plan and meets all of the requirements of the "one-man, one-vote" rule of law.

7. That the evidence adduced by intervenor failed to show that the plan offered by the two aforesaid public bodies would discriminate against blacks or in any manner dilute the black population.

I read this order as addressing two separate considerations.

The first is compliance with the one-man-one-vote mandate of Reynolds v. Sims. The second is a factual consideration of whether parish-at-large elections, which obviously solve this problem completely, might have the effect of diluting the voting strength of black voters who, while holding a majority position in total population, comprise a slight minority of the registered voters in the entire parish. Findings 3, 4, 5 and 7 are expressly addressed to this second problem, and, when considered in the context of the hearing record in this case which directly dealt with the dilution of voter effectiveness on a racial basis, appear to me to go to the heart of the proper questions that should concern the trier of fact in such a case. Certainly they are not limited to population statistics alone.

There can be no serious quarrel with the abstract legal premise that bare population statistics cannot become a talisman for determing wheter dilution of voting strength has occurred. However, this concession is no impediment to an insistence that the District Court and the prior panel opinion of this court were entitled and indeed required to consider the overall size of the population in this small rural parish in approving the apportionment plan involved. It is perfectly valid to compare the effect which an at-large voting plan would have on the strength of an ethnic group in East Carroll Parish with the result of any similar multimember district plan in a populous urban area such as those which have been involved in the previous Supreme Court cases to date. The opportunity for participation in a parish-at-large election among less than 13,000 people is *greater* than the opportunity to be a meaningful part of the elective process in a single-member district which numbers over 100,000 persons. Judge Dawkins also made a specific oral finding that the proposed plan was not racially motivated and did not have a racially deterrent effect in its operation. With all of these factors which were before the District Court and which obviously formed a part of its decisional process, I cannot agree that the District Court imposed

a constitutionally infirm reapportionment plan which watered down voting rights on the basis of population statistics alone.

The almost gossamer distinction between weighing each man's vote equally and preventing the dilution of the overall voting strength of an identifiable racial element within the electorate can be an elusive concept at best. However, it is not one which in my view escaped either the attention of Judge Dawkins in his original opinion or the panel that initially heard this appeal. With full recognition that White v. Regester and the other precedents cited in footnote 2 of the en banc majority opinion discuss a panoply of factors which may help identify the existence of dilution, I find no rule requiring that every such factor must be tested for and found in every case in which a dilution issue may be raised. The common denominator which all precedents demand be weighed in reaching the required ad hoc fact adjudication is: has the plaintiff met the burden of demonstrating that members of the ethnic group in question have less opportunity than do other residents in the district to participate in the political processes and to elect legislators of their choice? Though not expressed in these terms, this is the rule Judge Dawkins applied in evaluating the design and impact of this plan.

II.

I would be quick to agree that the en banc majority is correct when it states that dilution of voting strength is a question of fact. The difference between us arises because of my view that the record establishes the decision of the trial court in this case was not clearly erroneous. For example, Judge Coleman points out with emphasis in his dissent that the record in this case fails to reflect the number of *eligible* black citizens who have chosen not to register. How the majority opinion can conclude on such a record that the plaintiffs have demonstrated that past impediments to black voting still persist in this parish

and that the persistence of such impediments is manifested in the disparity between black population and black voter registration is an enigma to me. 1/ Until eligibility–based on age, residence, and freedom from other disqualifications established under federal law–is compared to nonregistration, this appears to be nothing more than a tenuous assumption. However, it is an assumption which is essential to the en banc court's reversal of the trial court as clearly erroneous.

The proof adduced in the District Court concerning the operation of the at-large election plan which governed the 1970 elections in this parish disclosed that a black candidate in the primary election for the Police Jury was defeated by only 9 votes. Another black candidate qualified for the second primary in which he ran third, 12 votes behind the second place white candidate. A third black candidate won in his contest against the incumbent president of the Police Jury, polling more votes than any candidate, not just for this post but in the entire election.

In the 1972 election which was held for only three of the nine school board posts, two blacks and one white candidate were elected. If the focus is upon "the design and impact" of at-large elections "in the light of past and present reality, political and otherwise," it is manifest that here there was no dilution of the black vote. But the majority sets its blinders so that it cannot see the present political reality because the election results were not before the District Court when it rendered its judgment.

While I unqualifiedly endorse the view that we cannot take

1/ For example, the 1970 census reflects that 49.6% of the black population of East Carroll Parish is under 18 years of age as compared to only 38.5% of the white population.

cognizance of issues not raised or evidence that could have been but was not introduced in the court below, we are confronted with neither of these factors here. The 1972 election was held subsequent to the District Court's judgment of August 2, 1971. The result of the election is *not disputed* and was proffered to us on appeal. While the appellate process is going on, we can no more halt the political and electoral processes than we can stop the clock. We should not, however, turn either of them back when they are running properly. I see nothing novel or prejudicial about the consideration of current relevant *undisputed* matters brought to our attention on an appeal from an injunction decree. Indeed, our failure to do so is to shut our eyes to present political reality in East Carroll Parish and to do violence to the basic legal principle that injunction orders operate *in futuro*.

Finally, I am unable to agree with the majority that the 1972 election results should not be considered because of the purely speculative possibilities that the election of a black might serve the selfish political purposes of a white candidate, or that it would be better for a white to lose an election than to lose a law suit.

III.

White v. Regester charts a clear course for adjudicating attacks on plans involving multimember districts—which in logic of analysis are merely one form of at-large voting, differing only in the extent of the geographic area involved. I cannot help but conclude that part III of the en banc majority opinion is diametrically at variance with the simple direct rule laid down by the Supreme Court in that case. By today's decision this court creates a rule which would limit the use of multimember districts to those instances where proof can be adduced which demonstrates that a "*greater* opportunity for participation" in the political process would be afforded to whichever

race may be in the minority than would be possible in single member districts, or for a showing that the use of at-large election districts "*enhances* the opportunity" for minority participation in the political process. Without regard to the fact that such proof might be well-nigh to impossible to make, the law's announced preference for single member districts in populous areas does not mean that multimember districts must overcome some stigma to survive. To require that any particular plan be demonstrated to operate so as to afford an advantage to any minority ethnic group at the polling place is not an exercise of color-blind color consciousness but a legal mandate for reverse discrimination. It is not merely a rule out of keeping with the latest law of the Supreme Court, but is a mistake of major dimensions that will place the courts squarely in the center of the "political thicket."

The trier of fact in this case did not utilize an erroneous legal principle but rather applied considerations well within the rule just announced in White v. Regester. The record demonstrates ample evidence to indicate that the findings of fact made by the District Court were not clearly erroneous. For these reasons I would affirm the District Court. Most certainly I would refrain from creating any new rule regarding the use of multimember districts which runs counter to the most recent pronouncement of the Supreme Court. Thus, I dissent.

Supreme Court, U. S.
FILED
APR 7 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-969

J.P. HOUSE, ET AL.,
Petitioners,

VERSUS

GEORGE WALLACE, SR., ET AL.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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J.P. HOUSE, ET AL.,
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RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents pray that this Court deny the petition for writ of certiorari sought by petioner to review the decision of the United States Court of Appeals for the Fifth Circuit rendered September 17, 1976, in response to this court's remand of April 26, 1976 _____ U.S. _____ (1976) and affirming the

judgment of the United States District Court for the Western District of Louisiana issued June 6, 1976, 377 F. Supp. 1192 (1974).

QUESTION PRESENTED

Whether on remand from this court, the Court of Appeals clearly erred in upholding the District Court's use of single-member districts as a remedy to a concededly unconstitutional and racially discriminatory districting scheme.

STATEMENT OF THE CASE

The District Court applying the standards of White v. Regester 412 U.S. 755 (1973) and related cases, found that at-large elections for aldermen of the town of Ferriday were constitutionally infirm and as a remedy provided a single-member district plan which it required defendants-petitioners to devise and submit to the court. The District Court rejected a plan proposed by the aldermen which employed one at-large seat and four districts. The District Court fully considered this plan, but found no special circumstances for preferring it over the single-member district plan. (See particularly findings #43 through 48 of the District Court's findings of facts and conclusions of law at p.A-55 through A-57 of the petition).

The Fifth Circuit writing prior to this Court's decision in East Carroll Parish School Board v. Marshall ___ U.S. ___ (1976) 96 S.Ct. 1083 affirmed the District Court's invalidation of the

at-large election scheme, but reversed the District Court's preference for single-member districts as a remedy. Your present respondents then petitioned this court for a writ of certiorari, urging remand in light of the East Carroll decision, supra. On April 26, 1976, this court granted the writ, vacated the judgment and remanded the case to the Fifth Circuit for further consideration in light of East Carroll, supra. On remand, the Fifth Circuit, found that in light of East Carroll, supra, the District Court had indeed applied the proper standard in preferring single-member districts as a remedy absent unusual circumstances. The District Court had in fact considered whether there were any special circumstances which would compel a different remedy but had found none. The Fifth Circuit, noting the completeness of the record on this issue, similarly could find no special circumstances which would justify the abandonment of single-member districts as a remedy and accordingly affirmed the District Court's judgment.

Defendant-petitioners took no action and the mandate issued to the District Court on October 26, 1976. Upon receipt of the mandate and upon motion of plaintiffs-respondents for compliance therewith, the District Court on November 1, 1976 entered an order (see P. A-143-4 of petition) directing that the elections proceed under the District Court's single-member district plan. On November 8, 1976 defendants-petitioners moved the Fifth

Circuit to recall the mandate. On November 16, 1976 the Fifthe Circuit denied the motion. Defendant-petitioners have made no attempt to obtain a stay from this Court. Elections have thus gone forward and were completed on March 15, 1976. In these elections two white aldermen (Raymond Galloway and Eddie Max Newman) and three black aldermen (Elijah Calhoun , Henry A. Montgomery and Clarence Hymon) were elected. The newly elected mayor is white. The Secretary of State of Louisiana will officially promulgate the results of the election on March 28, 1977 and commissions will be issued to the newly elected aldermen on the following day.

REASONS FOR DENYING THE WRIT

Petitioners principal complaint is that the decision of the Court of Appeals below did not direct that the District Court consider once again whether unusual circumstances exist in this case to exempt it from the rule that in devising remedial redistricting plans District Court should give preferance to single-member districts. The District Court considered this issue in great detail at the original trial. The defendant-petitioners submitted the single-member district plan to the District Court only under protest and urged most strenously that the District Court approve instead the plan with at-large feature as a remedy. After hearing extensive evidence (including expert testimony) on the question of which plan

was the most appropriate remedy, the District Court made specific findings regarding its choice of a remedial plan. There is no question that the District Court considered the very facts which petitioners now urge that the District Court be made to reconsider (see District Court findings of fact and conclusions of law, P. A-46 through A-57 of the petition).

The District Court clearly was applying the proper standards in accordance with this Court's decisions in Connor v. Johnson 402 U.S. 690 (1971), Connor v. Williams 404 U.S. 549 (1972) and Mahan v. Howell 410 U.S. 315 (1973) This Court's decisions in Chapman v. Meier, 420 U.S. 1 (1975) and East Carroll, supra, rendered subsequent to the District Court's decision only reinforce the conclusion that the District Court applied the proper standard to the facts of this case. The Fifth Circuit so found on remand from this Court. No purpose would have been served by requiring the District Court to again consider whether single-member districts was the appropriate remedy.

The decision below thus does not conflict with decisions of this Court, does not conflict with other decisions of the Fifth Circuit and does not conflict with decisions of other circuits. Further, the central contention of the petition, that the District Court should be required to consider again specific facts, is hardly any issue of broad policy which would warrant issuance of the writ. Accordingly the writ should

be denied.

It should be further observed that due to the failure of defendants-petitioners to seek and obtain a stay of the mandate, the District Court has ordered the elections to proceed and a new Board of Aldermen has been elected, will have been issued their commissions and will have taken office by the time this response is received by the Court. Under Rule 25 (d) (1) of the Federal Rules of Civil Procedure, the new aldermen are automatically substituted for their predecessors in office as Party Defendants. Further it is entirely conceivable that upon assuming office the new aldermen will enact into law the Court directed single-member district plan. Thus, serious doubts are raised as to whether a case or controversy remains after commissions are issued to the newly elected aldermen on March 29, 1977. For this additional reason respondents urge that it would be inappropriate for the writ to be granted.

CONCLUSION

For the foregoing reasons respondents respectfully urge that the petition for a Writ of Certiorari be denied and that this final chapter in the struggle of Black People to cast an unfettered vote in Ferriday, Louisiana be concluded.

Respectfully submitted,

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by _____

CERTIFICATE

I, Stanley A. Halpin, Jr., Attorney for Respondents, and a member of the Bar of the United States Supreme Court, do hereby certify that on this _____ day of March, 1977, I served copies of the foregoing Response to Petition for Writ of Certiorari on the attorney of record for petitioners herein, Mr. Norman Magee, 1007 North Fourth Street, Ferriday, Louisiana 71334.

STANLEY A. HALPIN JR.
Attorney for Respondents